
“IMMIGRATION LAW SERIES: APPELLATE ADJUDICATION PART IV”

Thursday, December 8, 2016
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

AGENDA

This session will be held in the K.D. Rooney Training Center (Tower - 18th Floor)

DEVELOPMENTS IN THE CATEGORICAL APPROACH: PROBABILITY & DIVISIBILITY

This presentation will examine the issues that arise when analyzing the immigration consequences of a criminal conviction. The presentation will explore recent developments with respect to the categorical, modified categorical, and circumstance-specific approaches. The training will focus on the concepts of “realistic probability” and “divisibility.” The presentation will utilize both hypothetical and real-life examples to demonstrate the application of these concepts.

Learning Objectives: By the completion of this session, attendees should:

- Understand the importance of recent developments in the criminal/immigration arena.
- Understand the framework for applying the categorical and modified categorical approaches.
- Understand how and when the concepts of “realistic probability” and “divisibility” are applied.

9:30 – 10:00 a.m.	Registration
10:00 – 10:05 a.m.	Introduction <i>Roger Pauley, Speaker & Moderator</i> <i>Board Member</i> <i>U.S. Department of Justice</i> <i>Executive Office for Immigration Review</i> <i>Board of Immigration Appeals</i>
10:05 – 10:15 a.m.	Recent Developments <i>Joshua Lunsford, Speaker</i> <i>Attorney Advisor</i> <i>U.S. Department of Justice</i> <i>Executive Office for Immigration Review</i> <i>Board of Immigration Appeals</i>
10:15 – 10:20 a.m.	The Categorical Approach: An Overview <i>Joshua Lunsford, Speaker</i>
10:20 – 10:50 a.m.	Breadth of Application & Realistic Probability <i>Jennifer Page-Lozano, Speaker</i> <i>Attorney Advisor</i> <i>U.S. Department of Justice</i> <i>Executive Office for Immigration Review</i> <i>Board of Immigration Appeals</i>
10:50 – 11:00 a.m.	Panel & Audience Discussion
11:00 – 11:10 a.m.	Break (NO CLE CREDIT)

- 11:10 – 11:30 a.m. Divisibility**
John Crossett, Speaker
Attorney Advisor
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
- 11:30 – 11:40 a.m. The Modified Categorical Approach**
John Crossett, Speaker
- 11:40 – 11:55 a.m. Wrap-up**
Joshua Lunsford, Speaker
- 11:55 – 12:05 p.m. Panel & Audience Discussion**

WAIVER, ABANDONMENT, AND EXHAUSTION

This presentation will address the concepts of waiver, abandonment, and exhaustion in removal proceedings. The presentation will discuss the legal authority defining these doctrines and how the doctrines can appropriately be applied by adjudicators. The presentation will discuss the different circumstances in which respondents effectively abandon their claims to relief, and in which parties waive their rights to appeal certain issues, and effectively or ineffectively exhaust an issue or claim for purposes of Board and (where applicable) Judicial review. The presentation will also provide a Board Member's perspective on how these concepts often work in practice, and provide time for questions from the audience.

Learning Objectives: By the end of this session, attendees should:

- Understand abandonment and;
 - the different ways a respondent can abandon a claim to relief;
 - how the Board treats abandonment in those situations; and
 - the Circuit Court treatment of the Board's finding of abandonment.
- Understand waiver, exhaustion, and;
 - what parties need to do to make sure an issue is fully developed before the Immigration Judge and also the Board, so that it can be properly addressed on appeal;
 - the Board's application of the doctrine of waiver;
 - the different types of waiver and if/when a party can challenge a finding of waiver;
 - the purpose of the exhaustion requirement; and
 - how and when a party exhausts a claim or issue on appeal to the Board for purposes of any subsequent Judicial review.

- 1:00 – 1:30 p.m. Registration**
- 1:30 – 1:35 p.m. Introduction**
Linda Wendtland, Speaker & Moderator
Board Member
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

- 1:35 – 1:50 p.m.** **Abandonment**
Heidi K. Hansen, Speaker
Attorney Advisor
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
- 1:50 – 2:10 p.m.** **Waiver and Exhaustion**
Hillary Scholten, Speaker
Attorney Advisor
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
- 2:10 – 2:20 p.m.** **Case Scenarios/Audience Participation**
Heidi K. Hansen & Hillary Scholten, Speakers
- 2:20 – 2:30 p.m.** **A Board Member's Perspective**
Linda Wendtland, Speaker & Moderator
- 2:30 – 2:35 p.m.** **Questions & Answers**

FACULTY BIOGRAPHIES

ROGER PAULEY is a Board Member with the Board of Immigration Appeals. He was appointed as Board Member by Attorney General John Ashcroft in September 2001. Mr. Pauley received a Bachelor of Arts degree in 1962 from Harvard College and a Juris Doctorate in 1964 from Harvard Law School. From 1980 to 2001, he served as Director, Legislation, Office of Policy and Legislation, Criminal Division, DOJ. From 1975 to 1980, he worked in the Criminal Division, DOJ, in a variety of positions. From 1973 to 1974, Mr. Pauley served on the staff of the Committee on the Judiciary in the U.S. House of Representatives. From 1966 to 1973, he served in the appellate section of the Criminal Division, DOJ. Mr. Pauley is a member of the District of Columbia and New York State Bars.

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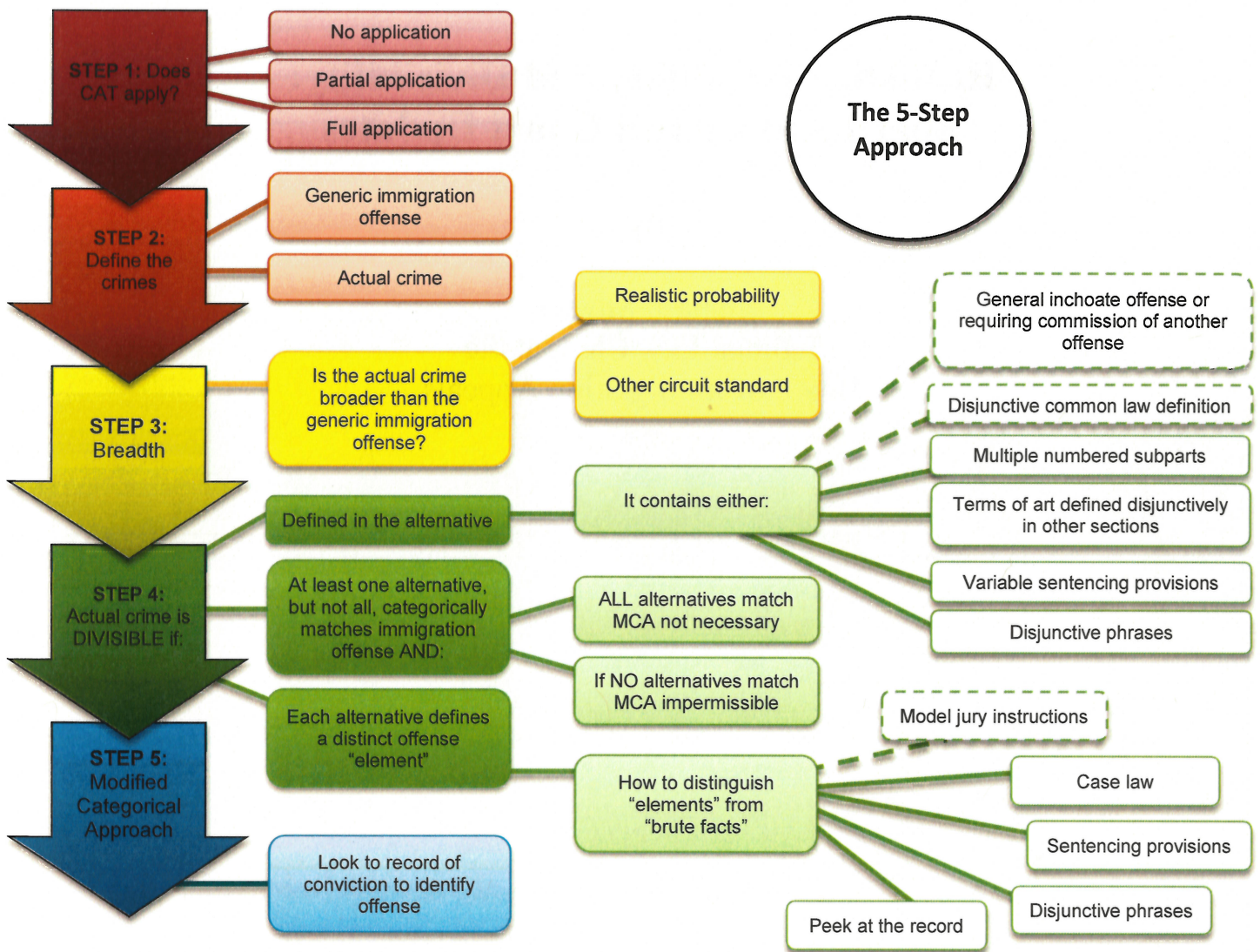
LINDA WENDTLAND is a Board Member with the Board of Immigration Appeals. She was appointed as Board Member by Attorney General Michael Mukasey in August 2008. Ms. Wendtland received a Bachelor of Arts degree in 1982 from the University of Virginia and a Juris Doctorate in 1985 from the University of Virginia. From 1996 to 2008, she served as Assistant Director and Senior Litigation Counsel at the Office of Immigration Litigation (OIL), Civil Division, DOJ. From 1990 to 1996, Ms. Wendtland was in private practice. From 1985 to 1990, she served as a Trial Attorney at OIL, entering on duty through the Attorney General's Honor Program. Ms. Wendtland is a member of the District of Columbia and Commonwealth of Virginia Bars.

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Realistic Probability and Divisibility: Board and Circuit Court Updates

By:

Ilana J. Snyder
Judicial Law Clerk at the
Board of Immigration Appeals

The author's views expressed herein do not necessarily represent the views of the Board of Immigration Appeals, the Executive Office for Immigration Review, or the Department of Justice.

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I. Realistic Probability

a. Board of Immigration Appeals

Matter of Mendoza-Osorio, 26 I&N Dec. 703 (BIA 2016)

Actual Crime: NYPL § 260.10-endangering the welfare of a child

Generic Immigration Offense: 237(a)(2)(E)(i) (crime of child abuse)

Held: Alien could not show realistic probability in the advocated manner that would not qualify as “child abuse”

The respondent, a native and citizen of Ecuador and LPR, was convicted in 2013 of endangering the welfare of a child, in violation of New York Penal L. section 260.10. The Department charged respondent with removability pursuant to section 237(a)(2)(E)(i) of the Act, as an alien who has been convicted of a “crime of child abuse, child neglect, or child abandonment,” which the Immigration Judge sustained.

In his appeal before the Board, respondent argued that section 260.10 criminalizes conduct not within the definition of “child abuse,” as articulated by the Board in *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). To support this argument, respondent posed several hypothetical scenarios of conduct this New York law could cover, including “leaving a child unattended for a short period, driving with a suspended license in the presence of a child, and committing petit larceny in the presence of a child.” *Id.* at 707. In finding that respondent could not demonstrate a realistic probability that New York applies its law in the manner suggested by respondent, the Board first stated that respondent did “not provide[] citations to any cases involving these [nongeneric] circumstances.” *Id.* Further, the Board determined that “[s]ince there was no conviction in any of these cases, they are *unpersuasive* in establishing that there is a realistic probability that section 260.10 would be successfully applied to conduct outside our definition of child abuse.” *Id.* (citations omitted) (emphasis added). Since respondent was unable to show that the State actually prosecutes section 260.10 in the manner he suggested, the Board upheld the Immigration Judge’s decision and dismissed the alien’s appeal. *Id.* at 712 (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693 (2013) (“to defeat the categorical approach, the noncitizen would have to demonstrate that the State *actually prosecutes* the relevant offense in [the non-generic manner suggested].”(emphasis added)).

Matter of Ferreira, 26 I&N Dec. 415 (BIA 2014)

Actual Crime: Ct. Gen. Stat. § 21a-277(a)-sale of illegal drugs

Generic Immigration Offense: INA §§ 237(a)(2)(A)(iii), (B)(i)-aggravated felony/controlled substance

Held: Record remanded to determine whether there is a realistic probability that Connecticut actually prosecutes violations of § 21a-277(a) involving substances that are not Federally controlled

The respondent, a native and citizen of Brazil, and lawful permanent resident since 2004, was convicted in 2010, of the “sale of certain illegal drugs” in violation of section 21a-277(a) of the Connecticut General Statutes Annotated. The Department charged respondent as removable as an aggravated felon as an alien who has been convicted of a controlled substance offense. Sections 237(a)(2)(B)(i), (a)(2)(A)(iii) (as defined in section 101(a)(43)(B) of the Act). The Immigration Judge concluded that in 2010, Connecticut’s schedule covered two drugs that were not on the Federal schedule, and the statute was thus overbroad. Proceeding to the modified categorical approach, the Immigration Judge then determined that respondent’s offense involved a “narcotic” substance, which was covered on the CSA, and sustained the charges of removability.

On appeal, the respondent argued that the Immigration Judge erred in not considering whether Connecticut actually prosecutes individuals for the sale of the two narcotic drugs not listed on the Federal schedule—benzylfentanyl and thenylfentanyl—as required by the Supreme Court’s decision in *Moncrieffe* and *Duenas-Alvarez*. The Board held that “the ‘realistic probability’ test must be applied *as part of* the categorical

approach,” and remanded because the Immigration Judge moved to the modified categorical approach without “first apply[ing] the realistic probability test.” *Ferreira*, 26 I&N Dec. at 421-22.

b. Recent Circuit Court Decisions

***Singh v. Att’y Gen. of U.S.*, 839 F.3d 273 (3d Cir. 2016)**

Actual Crime: 35 Pa. Stat. § 780-113(a)(30)-manufacture/delivery/possess with intent to sell a CS

Generic Immigration Offense: INA §§ 237(a)(2)(A)(iii) (as defined in INA § 101(a)(43)(B));
237(a)(2)(B)(i)

Held: Overbroad because statute covers non-Federally controlled substances; divisible

Petitioner in this case, a native and citizen of India and lawful permanent resident since 2009, was ordered removed as an aggravated felon for his conviction under 35 Pa. Stat. § 780-113(a)(30). The Immigration Judge concluded that the statute was overbroad, but divisible and after applying the modified categorical approach, concluded that petitioner’s offense necessarily involved a Federally controlled substance. The Board affirmed the Immigration Judge’s decision, but found the Immigration Judge’s consideration of the modified categorical approach inappropriate because although the statute covered drugs not listed on the Federal schedule, there were “no reported decision[s] of a Pennsylvania court in which a defendant was convicted...[for] conduct involving a substance that was not included in the Federal controlled substance schedules,” *id.*, and therefore no realistic probability that Pennsylvania would actually prosecute individuals for conduct not involving a substance listed by the CSA.

On petition for review, the Third Circuit only examined the Board’s decision because the Board did not defer to the Immigration Judge’s decision. The Third Circuit first concluded that the statute is overbroad but that the Board “erred in conducting a ‘realistic probability’ inquiry,” reasoning that the realistic probability test “simply [does] not [] apply,” where “the elements of the crime of conviction are not the same as the elements of the generic federal offense.” *Singh v. Att’y Gen. of U.S.*, 839 F.3d at 286 & n. 10. The Third Circuit then applied *Mathis* and concluded that since the highest court in Pennsylvania decided in *Commonwealth v. Swavelly*, 554 A.2d 946, 949 (Pa. Sup. Ct. 1989) that the particular drug at issue is an element of the offense the statute is divisible. Applying the modified categorical approach and examining the judicially noticeable documents, the circuit court concluded that petitioner’s conviction involved a counterfeit substance—not regulated on the Federal schedule—and accordingly, granted the petition for review.

***Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015)**

Actual Crime: Cal. Penal Code § 311.11(a)- Possess/control child pornography

Generic Immigration Offense: INA §§ 237(a)(2)(A)(iii) (as defined in INA § 101(a)(43)(I))

Held: Overbroad because statute covers non-Federally regulated behavior; demonstration of RP was not necessary because state statute’s breadth was evident from the text of statute

Petitioner, a native and citizen of Mexico and lawful permanent resident since 1999, was ordered removed as an aggravated felon as defined in INA § 101(a)(43)(I) for his conviction for possessing or controlling child pornography under California Penal Code § 311.11(a). The Immigration Judge concluded that the statute was a categorical match for 18 U.S.C. § 2252(a)(2) (one of the cross-referenced statutes in INA § 101(a)(43)(I)), sustained the charge of removability and denied all relief. The Board affirmed, acknowledging petitioner’s argument that under California law an offender can be convicted under section 311.11(a) “for possessing images found in his computer’s temporary cache even if he is unaware of the cache.” The Board ultimately rejected this argument, reasoning that this conduct is also covered by 18 U.S.C. § 2252.

In granting the petition for review, the Ninth Circuit first noted that section 311.11 includes depictions proscribed by Cal. Penal Code section 288, which minimally covers lewd and lascivious acts—“any touching’

on ‘any part’ of a child’s body with the intent of arousing sexual desires.” *Id.* at 1009. The generic immigration offense, on the other hand, does not cover such behavior, and the Court accordingly found that 311.11(a) is categorically overbroad. The circuit court then considered the Government’s argument that petitioner “failed to show a ‘realistic probability’ that a defendant would ever be convicted under § 311.11(a) for possessing a depiction of a lewd or lascivious sexual act as defined in § 288.” *Id.* The court concluded that where, as here, a “‘state statute’s greater breadth is evident from its text,’ a petitioner need not point to an actual case applying the actual crime in a nongeneric manner[.] [rather] petitioner may simply ‘rely on the statutory language to establish the statute is overly inclusive.’” *Id.* at 1010 (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc); *United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc)). The Ninth Circuit concluded that the statute was overbroad, and not being divisible, remanded to the Board for further consideration.

***Ramos v. U.S. Att’y Gen.*, 709 F.3d 1066 (11th Cir. 2013)**

Actual Crime: Ga. Code Ann. § 16-8-14-theft

Generic Immigration Offense: INA §§ 237(a)(2)(A)(iii) (as defined in INA § 101(a)(43)(G))

Held: Overbroad—realistic probability shown; divisible

Petitioner, a native and citizen of the Philippines, and had been a lawful permanent resident before being charged with removability for having committed two or more crimes involving moral turpitude and having been an aggravated felon. Sections 237(a)(2)(A)(ii), (a)(2)(A)(iii) (as defined in section 101(a)(43)(G)) of the Act. The Immigration Judge sustained the aggravated felony charge, finding it was a categorical match for petitioner’s conviction under Georgia Code Annotated section 16-8-14. The Board affirmed the Immigration Judge’s decision.

On review, the Eleventh Circuit concluded that generic theft offenses require “the *criminal intent to deprive* the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Id.* at 1069 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 188-89 (2007)). Comparing the Georgia statute at issue to a similarly-worded Florida statute that was at issue in a prior case, the circuit court concluded as it did in the Florida case that a statute that covers an intent to *deprive* and an intent to *appropriate* is divisible. *Id.* at 1071-72. In dismissing the Government’s argument that petitioner was required to demonstrate a realistic probability that Georgia would prosecute offenders who merely had an intent to *appropriate*, the Eleventh Circuit held that this test is “not require[d] [] when the statutory language itself, rather than ‘the application of legal imagination’ to that language, creates the ‘realistic probability’ that a state would apply the statute to conduct beyond the generic definition.” *Id.* Since the Georgia statute explicitly states that intent not satisfying the theft offense definition will satisfy the statute, the circuit court found the statute was divisible. After applying the modified categorical approach and concluding that petitioner had been convicted for the non-theft-offense-intent, the Eleventh Circuit granted the petition for review.

c. In the CIMT Context

Cir./ Bd.	Apply the RP Test?	Authority	If not, what test?
Bd.	Yes.	<i>Matter of Sivla-Trevino</i> , 26 I&N Dec. 826 (BIA 2016) (“Unless circuit court law dictates otherwise, the realistic probability test to the categorical inquiry... should be applied in deciding whether a crime involves moral turpitude.”)	N/A
1 st	Yes.	<i>Da Silva Neto v. Holder</i> , 680 F.3d 25, 29 & n.7 (1st Cir. 2012) (“[W]e will leave for another day the question of whether to adopt the ‘realistic probability’ test [in the CIMT context].”)	RP unless circuit expressly rejects it in CIMT context
2 nd	Yes.	<i>Efstathiadis v. Holder</i> , 752 F.3d 591, 595 (2d Cir. 2014) (applying the categorical approach in the CIMT context, but remaining silent on the realistic probability test)	RP unless circuit expressly rejects it in CIMT context
3 rd	No.	<i>Jean-Louis v. Att’y Gen. of U.S.</i> , 582 F.3d 462, 481-82 (3d Cir. 2009); <i>Mahn v. Att’y Gen. of U.S.</i> , 767 F.3d 170, 174 (3d Cir. 2014) (“[W]e look to the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain a conviction.”)	Least conduct hypothetically necessary to sustain a conviction
4 th	Yes.	<i>Prudencio v. Holder</i> , 669 F.3d 472, 484 (4th Cir. 2012) (applying the categorical approach in the CIMT context, but remaining silent on the realistic probability test)	RP unless circuit expressly rejects it in CIMT context
5 th	No.	<i>Gomez-Perez v. Lynch</i> , 829 F.3d 323, 327 (5th Cir. 2016) (quoting <i>Amouzadeh v. Winfrey</i> , 467 F.3d 451, 455 (5th Cir. 2006) (“[A] prior offense qualifies as a crime of moral turpitude if ‘the minimum reading of the statute necessarily reaches only offenses involving moral turpitude.’”)	Minimum reading of statute necessarily reaches only CIMT conduct
6 th	Yes.	<i>Yeremin v. Holder</i> , 738 F.3d 708, 715 (6th Cir. 2013) (applying the categorical approach in the CIMT context, but remaining silent on importing the realistic probability test to determine the “full range of conduct encompassed by the statute.”)	RP unless circuit expressly rejects it in CIMT context
7 th	Yes.	<i>Cano-Oyarzabal v. Holder</i> , 774 F.3d 914, 917 (7th Cir. 2014) (explicit adoption of the test in the CIMT context)	N/A
8 th	Yes.	<i>Villatoro v. Holder</i> , 760 F.3d 872, 877-79 (8th Cir. 2014) (explicit adoption of the test in the CIMT context)	N/A
9 th	Yes.	<i>Leal v. Holder</i> , 771 F.3d 1140, 1145 (9th Cir. 2014) (explicit adoption of the test in the CIMT context)	N/A
10 th	Yes.	<i>Rodriguez-Heredia v. Holder</i> , 639 F.3d 1264, 1267 (10th Cir. 2011) (explicit adoption of the test in the CIMT context)	N/A
11 th	Yes.	<i>Walker v. U.S. Att’y Gen.</i> , 783 F.3d 1226, 1229 (11th Cir. 2015) (applying the categorical approach in the CIMT context, but remaining silent on the realistic probability test)	RP unless circuit expressly rejects it in CIMT context

II. Divisibility: After Descamps but before Mathis

a. FOURTH CIRCUIT

United States v. Cabrera-Umanzor, 728 F.3d 347, 353 (4th Cir. 2013)

Actual Crime: Md. Code, Art. 27 § 35C-causing child abuse to a child

Generic Immigration Offense: 8 U.S.C. § 1326- “crime of violence” sentence enhancement

Held: Overbroad and indivisible, distinguishing between means and elements

In this sentencing case, petitioner initially pled guilty in 2001 to a violation of Md. Code, Art. 27 § 35C, causing abuse to a child. After serving his sentence, petitioner was deported, illegally re-entered the United States, was apprehended and pled guilty to a violation of 8 U.S.C. § 1326. At his sentencing hearing, the district court applied the modified categorical approach finding that some, but not all, violation of section 35C constituted “forcible sex offense[s]” and that petitioner’s offenses were “crime[s] of violence” under U.S.S.G. § 2L1.2 warranting a 16-level sentencing enhancement.

In vacating the petitioner’s sentence and remanding the case for resentencing to the district court, the Fourth Circuit first considered the elements of section 35C, and concluded that the statute only requires (1) an act involving sexual molestation or sexual exploitation of a minor; and (2) by a person with the requisite familial or custodial relationship to the minor.” *Id.* (internal citation and quotation marks omitted). The circuit court then considered U.S.S.G. § 2L1.2 which, at the time, defined “crime of violence” as a “forcible sex offense, sexual abuse of a minor or statutory rape.” U.S.S.G. § 2L1.2 cmt. n. 1(B)(iii). After comparing each of the elements of § 35C with the elements of the guideline, the circuit court found that because § 35C does not require the use or threatened use of force or require, did not require sexual gratification, and that a “defendant need not even touch the victim to be convicted of sexual abuse,” it did not fit within the generic definition of “crime of violence.” *Id.* (internal citations and quotation marks omitted).

The Fourth Circuit went on to consider the Government’s argument that the statute is divisible and that the district court’s employment of the modified categorical approach was therefore not in error. The Government argued that § 35C incorporated crimes known as “sexual offenses,” in Maryland. Since the Fourth Circuit had already held that second-degree “sexual offense” constitutes a “crime of violence” under U.S.S.G. § 2L1.2, the Government argued that at least some, but not all offenses listed by 35C constituted crimes of violence under the sentencing guidelines, and the statute was therefore divisible. *Cabrera-Umanzor*, 728 F.3d at 353. In rejecting this argument, the Fourth Circuit focused on the distinction between elements and means, stating that there are only two elements to section 35C, and that the “[t]he crimes, [the Government cited to] are not *elements* of the offense, but serve only as a non-exhaustive list of various *means* by which the elements of sexual molestation or sexual exploitation can be committed.” *Id.* (emphasis added). Since the court found these means were “simply irrelevant to [its] inquiry,” and that the statute was overbroad, the Fourth Circuit vacated the sentence and remanded for resentencing. *Id.* (citing *Descamps*, 133 S.Ct at 2285 n. 2).

Omargharib v. Holder, 775 F.3d 192, 198 (4th Cir. 2014)

Actual Crime: Va. Code Ann. § 18.2-95-grand larceny
Generic Immigration Offense: INA § 237(a)(2)(A)(iii) (as defined in INA § 101(a)(43)(G))
Held: Overbroad because conviction covers fraud and theft; indivisible because Virginia jury need not unanimously decide if theft was wrongful or fraudulent

Petitioner, a citizen of Egypt and Lawful Permanent Resident of the United States since 1990, was convicted in 2011 of grand larceny pursuant to Va. Code Ann. § 18.2-95. After commencement of removal proceedings, an Immigration Judge determined that petitioner was removable and ineligible for all forms of relief requested as an aggravated felon. 8 U.S.C. § 1101(a)(43)(G) (theft offense). Although petitioner argued and both the Immigration Judge and Board agreed that VCA § 18.2-95 is overbroad because it covers both theft and fraud offenses (for which the a separate aggravated felony provision exists—section 101(a)(43)(M)(i) of the Act), use of the modified categorical approach was appropriate because Virginia lists wrongful and fraudulent takings disjunctively. *Id.* at 195.

Citing to a number of Supreme Court of Virginia cases, the Fourth Circuit first concluded that section 18.2-95 is overbroad because it “treats fraud and theft as the same for larceny purposes, but the INA treats them differently.” *Id.* at 197. Citing to *Descamps*, 133 S. Ct. at 2284-85, the Fourth Circuit next rejected the Government’s argument that the statute is divisible and the modified categorical approach therefore applies. Citing to its precedent, the court clarified that the mere use of the word “or” does not render a statute divisible. *Id.* (citing *United States v. Royal*, 731 F.3d 333, 341-42 (4th Cir. 2013)). The Fourth Circuit then iterated its rule that a statute is only divisible “if it is defined to include ‘potential offense elements in the alternative,’ thus rendering ‘opaque which element played a part in the defendant’s conviction.’” *Id.* (quoting *Descamps*, 133 S. Ct. at 2284). “Elements, as distinguished from means, are factual circumstances of the offense the jury must find ‘unanimously and beyond a reasonable doubt.’” *Id.* at 198 (citations omitted).

Applying this rule to the statute at issue, the Fourth Circuit examined jury instructions and concluded that juries in Virginia are not instructed to unanimously decide whether a taking was wrongful or fraudulent. The circuit court thus concluded that “larceny in Virginia is indivisible as a matter of law.” *Id.* at 200. Since the offense is also overbroad, the court concluded that petitioner’s 2011 conviction was not a ‘theft offense,’ under section 101(a)(43)(G), granted the petition for review and remanded for reconsideration.

b. NINTH CIRCUIT

Coronado v. Holder, 759 F.3d 977, 985 (9th Cir. 2014)

Actual Crime: Cal. Health and Safety Code § 11377(a)-possession of a CS
Generic Immigration Offense: INA § 212(a)(2)(A)(i)(II)
Held: Overbroad because covers drugs not listed on CSA; divisible since the specific drug is an element of the offense

In this case, petitioner, a native and citizen of Mexico, was admitted to the United States for Lawful Permanent Residence, and was thereafter convicted of possession of a controlled substance in violation of Cal. Health and Safety Code (“CHSC”) § 11377(a). Petitioner was later placed into removal proceedings, and found removable by the Immigration Judge pursuant to section 212(a)(2)(A)(i)(II) of

the Act after attempting to re-enter the United States. *See* section 101(a)(13)(C) of the Act. The Board affirmed the Immigration Judge's decision.

In dismissing the petition for review, the Ninth Circuit first concluded that the California statute was overbroad because drugs covered on the California schedule are not listed on the federal controlled substance schedule. Turning then to the question of divisibility, the circuit court rejected petitioner's argument that CHSC § 11377(a) is indivisible because the list of drugs merely "provides alternative means of satisfying an indivisible set of elements." Relying on *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Ninth Circuit determined that the list of alternative substances in CHSC § 11377(a) "effectively creates several different crimes," that constitute elements of the offense and since some but not all of the drugs on California's drug schedules were covered by the CSA, a modified exam was appropriate to elucidate whether *petitioner's* conviction was one that involved a federally controlled substance.

Applying the modified categorical approach, the panel examined a certified e-docket record and docket entry minutes, holding that these convictions documents are as "equally reliable" as those exemplified in *Shepard v. United States*, 544 U.S. 13, 26 (2005). *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc) (per curiam) (holding that the court may consider conviction documents that are as "equally reliable" as those exemplified in *Shepard*). Upon review, the Ninth Circuit determined that the specific drug at issue was methamphetamine, and since methamphetamine is a Schedule II federally controlled substance, the circuit court denied the petition for review on these grounds¹.

Rendon v. Holder, 764 F.3d 1077 (9th Cir. 2014), reh'g en banc denied 782 F.3d 466 (9th Cir. 2015)

Actual Crime: Cal. Penal Code § 459/460(b)-second-degree burglary

Generic Immigration Offense: INA § 237(a)(2)(A)(iii) (as defined in INA §§ 101(a)(43)(G), (U)).

Held: Overbroad - defendant can commit Cal. offense with intent to commit any felony, but intent to commit theft required for generic offense; indivisible since disjunctive mens rea in statute defines alternative means, not alternative elements.

Rendon, a native of Mexico and Lawful Permanent Resident was convicted of second degree burglary under Cal. Penal Code § 459/460(b), and thereafter placed into removal proceedings. The Immigration Judge denied petitioner's application for cancellation of removal, finding that his conviction constituted an attempted theft offense, an aggravated felony as defined in sections 101(a)(43)(G), (U) of the Act. *See* 8 U.S.C. §1229b(a)(3)(disqualifying those convicted of aggravated felonies from cancellation of removal). In its affirmance, the Board employed the modified categorical approach, and determined that petitioner's plea revealed he was convicted of "entering a locked vehicle *with the intent to commit larceny*," which it found to be a clear match to the generic offenses listed at sections 101(a)(43)(G) and (U).

In granting the petition for review, the Ninth Circuit disagreed with the Board's application of the modified categorical approach. First, citing to California case law, the circuit court concluded that

¹ It should be noted, however, that the panel ultimately granted the petition for review in part and remanded for the Board to consider the petitioner's ineffective assistance of counsel and Immigration Judge bias claims in the first instance.

Cal. Penal Code § 459 covers a broader swath of conduct than the generic offense because the mens rea mentioned in section 459 can be satisfied by a criminal who has the intent to commit *any felony*, while the generic definition requires this criminal have the intent to commit *a theft offense*. Concluding then that the statute at issue is overbroad, the Ninth Circuit next addressed whether the statute at issue is divisible.

In citing to *Descamps*, the circuit court first stated that “it is black-letter law that a statute is divisible only if it contains multiple alternative *elements*, as opposed to multiple alternative *means*. *Rendon*, 764 F.3d at 1086 (emphasis in original). The court next distinguished between alternative *means* of committing an offense, and alternative *elements*. The latter, the court explained, creates functionally separate crimes and are those “facts the court can be sure the jury...found [unanimously and beyond a reasonable doubt].” *Descamps*, 133 S. Ct. at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 815 (1999) (plurality)). Means, however, are “those circumstances on which the jury may disagree yet still convict.” *Rendon*, 764 F.3d at 1086. Applying this distinction to section 459, the Ninth Circuit found that the alternative mens rea articulated are merely alternative *means* and this statute is therefore not divisible. Since the statute is both overbroad and indivisible, the Ninth Circuit concluded that conviction under Cal. Penal Code § 459 “cannot qualify as an attempted theft offense,” and remanded the case to the Board for further proceedings.

III. Post-*Mathis v. United States*, 136 S. Ct. 2243 (2016)ⁱ Landscape

a. SECOND CIRCUIT

Collymore v. Lynch, 828 F.3d 139, 145 (2d Cir. 2016)

Actual Crime: 35 Pa. Stat. Ann. § 780-113(a) (1997)-manufacture/deliver/possess w/intent a CS

Generic Immigration Offense: INA § 212(a)(2)(A)(i)(II)

Held: Overbroad since Pa. covers more drugs than CSA; divisible because the drug is an element of the offense, relying on *Clarke*

Petitioner, a lawful permanent resident of the United States since April 1989, was convicted of violating 35 Pa. Stat. Ann. § 780-113(a)(30) (1997) on December 8, 1997. After applying for admission to the United States as a returning LPR from a trip to Barbados in 2008, the DHS placed him into removal proceedings alleging he was inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. 8 U.S.C. § 1182(a)(2)(A)(i)(II) (inadmissible for having been convicted of a controlled substance violation) (correspond with section 101(a)(13)(C) of the Act)). The IJ denied Collymore’s motion to terminate proceedings, finding that 35 Pa. Stat. Ann. § 78-113(a)(30) “was not categorically a crime related to a federal controlled substance.” However, the Immigration Judge ultimately sustained the charge, citing *United States v. Abbott*, a case in which the Third Circuit concluded that the Pennsylvania statute at issue was divisible. 748 F.3d 154 (3d Cir. 2014). The IJ then employed the modified categorical approach, found the conviction was for cocaine and sustained the charge. *Id.* at 142. Relying on *Abbott*, the Board affirmed the IJ’s decision and dismissed the appeal.

In dismissing petitioner’s appeal, the Third Circuit found that neither the Board nor the IJ erred in applying the modified categorical approach. The circuit court noted that *Abbott* examines whether 35 Pa. Stat. Ann. § 78-113(a)(30) constitutes a controlled substance offense under the Armed Career

Criminals Act, but the Third Circuit in, *Clarke v. Ashcroft*, 100 F. App'x 884 (3d Cir. 2004) (unpublished), decided that the statute was categorically overbroad when considering how it matched with the generic removability offense. Nevertheless, the Third Circuit passed countenance that the IJ and Board's reliance on *Abbott* to conclude that 35 Pa. Stat. Ann. § 78-113(a)(3) contained alternative elements and was therefore divisible had not been overruled by *Mathis* since the Supreme Court's decision is not at odds with this holding in *Abbott*. *Collymore*, 828 F.3d at 145 n. 7.

b. THIRD CIRCUIT

***Singh v. Att'y Gen. of U.S.*, 839 F.3d 273 (3d Cir. 2016)**

Actual Crime: 35 Pa. Stat. Ann. § 780-113(a)(30)-manufacture/deliver/possess w/intent a CS

Generic Immigration Offense: INA § 237(a)(2)(A)(iii)(as defined in INA § 101(a)(43)(B))

Held: Overbroad since Pa. covers more drugs than CSA; divisible because the drug is an element of the offense

Finding that the specific drug under 35 Pa. Stat. Ann. § 78-113(a)(30) is an element of the offense—that is a “thing[] the ‘prosecution must prove to sustain a conviction.’” *Id.* (citing *Mathis*, 136 S. Ct. at 2248). However, since Pennsylvania's controlled substance schedule covers counterfeit controlled substances, which the Federal Schedule does not, the Third Circuit concluded that although the statute was overbroad it is divisible. The court remanded for the Board to apply the modified categorical approach to discover whether the particular drug employed was one listed on the Federal schedule.

***Chang-Cruz v. Att'y Gen. of U.S.*, No. 14-4570, 2016 WL 4446063 (3d Cir. Aug. 24, 2016)** **(unpublished)**

Actual Crime: New Jersey § 2C:35-7-distributing drugs near a school

Generic Immigration Offense: INA § 237(a)(2)(B)(i)

Held: Overbroad since Pa. covers more drugs than CSA; remanded for Board to consider whether the specific drug utilized is an element or brute fact

In this procedurally complex case, the Third Circuit concluded that the “elements” and “means” distinction articulated in *Mathis* is applicable in the immigration context. *Id.*, at * 3 fn. 3. Applying the tests expressed in *Mathis* to uncover whether New Jersey § 2C:35-7, an “alternatively phrased statute[],” listed elements or means, the Third Circuit concluded that New Jersey had not directly spoken on the issue, and remanded for the Board to consider this argument in the first instance.

c. FIFTH CIRCUIT

***United States v. Uribe*, 838 F.3d 667 (5th Cir. 2016)**

Actual Crime: Tex. Penal Code Ann. § 30.02(a)-burglary

Generic Immigration Offense: 8 U.S.C. § 1326-“crime of violence” sentence enhancement

Held: Relying on Texas' highest court for criminal cases' determination that statute lists alternative elements to conclude statute divisible

The petitioner in this case argued that *Mathis* disturbed the Circuit's prior holding in *Conde-Castaneda*, 753 F.3d 172, 175-79 (5th Cir. 2014), that Tex. Penal Code § 30.02(a) constitutes an aggravated felony under section 101(a)(43)(F) of the Act. The Fifth Circuit found that *Conde-Castaneda* was undisturbed because this statute lists multiple offenses in the alternative, is divisible and the petitioner in *Uribe* was convicted of the sub-provision that constitutes a crime of violence. Accordingly, the Fifth Circuit concluded that the Court's aggravation of his illegal reentry offense for having been convicted under section 30.02(a), which constitutes a crime of violence, was proper.

Gomez-Perez v. Lynch, 829 F.3d 323 (5th Cir. 2016)

Actual Crime: Tex. Penal Code Ann. § 22.01(a)(1)-assault

Generic Immigration Offense: INA § 240A(b)(1)(C) (correspond with INA § 212(a)(2)(A)(i)(I))

Held: Overbroad because of reckless mens rea and indivisible because jury need not unanimously agree on mens rea to convict

Fifth Circuit here concluded that the three culpable mental states listed in Tex. Penal Code Ann. § 22.01(a)(1) are "conceptually equivalent" means of satisfying the intent element of the statute, so jury unanimity as to a particular one is not required. *Id.* at 328 (internal citation omitted). Since simple reckless assault pursuant to section 22.01(a)(1) does not qualify as a CIMT and the statute is indivisible relative to the *mentes reae* listed, the circuit court concluded that the offense is categorically never a CIMT, and granted the petition for review.

United States v. Lara-Martinez, 836 F.3d 472 (5th Cir. 2016)

Actual Crime: Mo. Ann. Stat. § 566.083-sexual misconduct involving a child

Generic Immigration Offense: 8 U.S.C. § 1326-"crime of violence" sentence enhancement

Held: Alien could not show realistic probability of prosecution of cases that were not crimes of violence; divisible because listed alternative elements

In this sentencing case, petitioner initially pled guilty to a violation of Mo. Ann. Stat. § 566.083, sexual misconduct involving a child. After serving his sentence, petitioner was deported, illegally reentered the United States, was apprehended and pled guilty to a violation of 8 U.S.C. § 1326. Fifth Circuit in this case concluded that the statute was overbroad and, applying *Mathis*, divisible, because it listed multiple discrete offenses in one statute, some, but not all of which constituted crimes of violence. The court then concluded that petitioner had been convicted of subsection (3). However, in arguing that the minimum conduct prosecuted under this specific sub-section of conviction, petitioner was unable to point to any case to demonstrate that Missouri prosecuted cases in the non-generic manner for which he argued, mainly that an officer pretending to be a child could be coerced into exposing him or herself. Accordingly, the Fifth Circuit affirmed the district court's order aggravating petitioner's illegal reentry offense for having been convicted under § 566.083(3), concluding that the district court did not err in concluding that the offense constitutes a crime of violence.

d. NINTH CIRCUIT

United States v. Martinez-Gomez, No. 14-50427, 2016 WL 4254986, (9th Cir. Aug. 12, 2016) (unpublished)

Actual Crime: Cal. Penal Code § 245-assault with a deadly weapon
Generic Immigration Offense: 8 U.S.C. § 1326-“crime of violence” sentence enhancement
Held: Overbroad and categorically a match under *Grajeda* after *Mathis*

The Ninth Circuit affirmed a district court order enhancing petitioner’s illegal reentry sentence 16 levels because he had been convicted of a violation of Cal. Penal Code § 245 which constitutes a “crime of violence.” In so holding, the Ninth Circuit determined that its prior decision in *Grajeda*, finding that conviction under Cal. Penal Code § 245 for assault with a deadly weapon qualifies as a “crime of violence,” remains good law because it, and the petitioner’s case “involve[] only the pure categorical approach.” 581 F.3d 1186, 1189 (9th Cir. 2009).

Garcia v. Lynch, No. 15-73170, 2016 WL 6819705 (9th Cir. Nov. 18, 2016) (unpublished)

Actual Crime: Or. Rev. Stat. § 475.992-delivery of methamphetamine
Generic Immigration Offense : 208(b)(2)(B)(i) (correspond with INA § 101(a)(43)(B))
Held: Overbroad for covering simple possession which is not a felony under the CSA and delivery which is a CSA felony; divisible because Oregon punishes these offenses differently

In this unpublished decision, the Ninth Circuit affirmed the Immigration Judge and Board’s decision that the alien was statutorily ineligible for asylum and withholding of removal for having been convicted of a particularly serious crime, which, in this case, was confined to the definition of an aggravated felony. *See* sections 208(b)(2)(B)(i), 241(b)(3)(B)(ii) of the Act; *see also Matter of Y-L-*, 23 I&N Dec. 270, 274 (A.G. 2002) (drug trafficking offenses presumptively constitute particularly serious crimes). In considering whether the statute at issue, Oregon Rev. Stat. § 475.992, constituted an aggravated felony as defined in section 101(a)(43)(B) of the Act (illicit trafficking in a controlled substance as defined in the Controlled Substances Act), the court first concluded that the statute is overbroad because it covers simple possession of controlled substances—a crime not considered a felony under the CSA—and delivery of that substance—which is considered a felony under the CSA. The Ninth Circuit then determined that because Oregon punishes these offenses differently, the statute is divisible. *Id.* (citing *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016)). Since the modified categorical approach revealed that petitioner’s conviction was for delivery of methamphetamine, the Ninth Circuit concluded that the Board neither erred in concluding that this offense constitutes an aggravated felony nor in denying his applications for relief on that basis.

United States v. Sanchez-Fernandez, No. 15-10291, 2016 WL 5404056 (9th Cir. Sept. 29, 2016) (unpublished)

Actual Crime: Ariz. Rev. Stat. § 13-3408(A)(2)-possession of narcotics for sale
Generic Immigration Offense: 8 U.S.C. § 1326-“drug trafficking offense” sentence enhancement
Held: Overbroad for covering non-federally controlled substances and indivisible after looking at the model jury instructions as instructive of whether the specific drug is an element of the offense

In a similar vein, the Ninth Circuit concluded that the district court erred in applying a 16-level sentencing enhancement to increase the petitioner's sentence for illegal reentry because of a prior conviction for possession of narcotics for sale in violation of Ariz. Rev. Stat. § 13-3408(A)(2). The Ninth Circuit first determined that the Arizona statute "criminalizes possession for sale of certain substances that are not federally controlled," and is thus overbroad. *Id.*, at *1 (citing *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990-91 (2015)). Applying *Mathis*, which the Ninth Circuit noted, "neither the district court nor the parties had the benefit of," when sentencing occurred, the court concluded that the statute is indivisible because Arizona does not require jury unanimity on the specific drug possessed. *Id.* (quoting RAJI (Criminal) § 34.082). Since an overbroad indivisible statute can never constitute a removable offense, the Ninth Circuit reversed the sentence imposed and remanded for resentencing.

Sandoval v. Lynch, No. 14-73749, 2016 WL 4245512 (9th Cir. Aug. 11, 2016) (unpublished)

Actual Crime: Cal. Penal Code § 273.5-willful infliction of corporal injury on a spouse

Generic Immigration Offense: INA § 212(a)(2)(A)(i)(I)-CIMT

Held: Remand necessary for divisibility analysis

The Immigration Judge denied voluntary departure, finding that the petitioner's conviction under Cal. Penal Code § 273.5 was divisible and the specific subsection of conviction constituted a crime involving moral turpitude. The Ninth Circuit remanded in light of *Mathis* for the IJ to reconsider whether the statute is divisible.

e. TENTH CIRCUIT

United States v. Maldonado-Palma, 839 F.3d 1244 (10th Cir. 2016)

Actual Crime: N.M. Stat. Ann. § 30-1-12(b), 30-3-2(A)-aggravated assault

Generic Immigration Offense: 8 U.S.C. § 1326-"crime of violence" sentence enhancement

Held: Categorically constitutes a COV under "elements" clause

Applying *Mathis* and looking to state decisions rendered, the Tenth Circuit concluded that conviction under N.M. Stat. Ann. § 30-1-12(b), 30-3-2(A) for aggravated assault minimally requires the active employment of a deadly weapon when committing the assault. Since New Mexico's definition of deadly weapon is "any firearm or weapon capable of producing death or great bodily harm," the circuit court found that the offense categorically constitutes a crime of violence and that the district court did not err in increasing the petitioner's criminal history points 16 levels when construing his sentence for violation of 8 U.S.C. § 1326.

f. ELEVENTH CIRCUIT

Spaho v. U.S. Att'y Gen., 837 F.3d 1172 (11th Cir. 2016)

Actual Crime: Fla. Stat. Ann. § 893.13(1)(a)-trafficking in a controlled substance

Generic Immigration Offense: INA § 237(a)(2)(A)(iii) (as defined in INA § 101(a)(43)(B))

Held: Overbroad for covering some acts that are CSA felonies and some that are not; divisible after looking at Double Jeopardy Clause analysis

The Eleventh Circuit affirmed the Immigration Judge and Board's decision that the alien was removable as having been convicted of an aggravated felony. Section 237(a)(2)(A)(iii) of the Act (correspond with section 101(a)(43)(B) of the Act (illicit trafficking in a controlled substance as defined in the Controlled Substances Act)). In considering whether the statute at issue, Fla. Stat. Ann. § 893.13(1)(a), constituted an aggravated felony as defined above, the court first concluded that the statute is overbroad because it covers some acts considered felonies under the CSA and some not. Applying *Mathis*, the court next concluded that these different acts "are separate crimes such that both can be charged in the same indictment without violating the Double Jeopardy Clause," and the statute is therefore divisible. *Id.* at 1178. Since the modified categorical approach revealed that petitioner's conviction was for selling a controlled substance, which is inherently commercial as required by *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992), the Eleventh Circuit concluded that neither the Board nor the IJ erred in concluding that this offense constitutes an aggravated felony.

Gelin v. U.S. Att'y Gen., 837 F.3d 1236, 1238 (11th Cir. 2016)

Actual Crime: Fla. Stat. Ann. § 825.102(1)-abuse of elderly person or disabled adult

Generic Immigration Offense: INA § 212(a)(2)(A)(i)(II)-CIMT

Held: Categorically constitutes a CIMT after examining minimum conduct proscribed by statute

The Eleventh Circuit dismissed the alien's petition for review challenging the Immigration Judge's order, and Board's affirmance, that his conviction for abuse of an elderly person or disabled adult, in violation of Fla. Stat. Ann. § 825.102(1) is categorically a crime involving moral turpitude. The Eleventh Circuit first examined the elements of the Actual Crime, and applying *Mathis*' counsel that "federal courts [] look to state court decisions interpreting an alternatively phrased statute for guidance," concluded that the statute minimally requires (1) "[a] culpable state of mind required by the statute; and (2) the particularly vulnerable nature of the victims." *Id.* (citation omitted). The Eleventh Circuit first concluded that the Florida statute articulated a sufficient mental culpability. Additionally, since the Florida statute requires this intentional act be specifically targeted against vulnerable, elderly victims, and considering the totality of these circumstances, the circuit court concluded that moral turpitude inheres in even the minimum conduct proscribed by the statute. Thus, it held that the statute is categorically a crime involving moral turpitude.

III. 18 U.S.C. § 16(b) Void for Vagueness Chart

Cir.	16(b) Void?	Authority	Context
3 rd	Yes.	<i>Baptiste v. Att'y Gen. of U.S.</i> , --F.3d--, No. 14-4476, 2016 WL 6595943 (3d Cir. Nov. 8, 2016)	IMM
6 th	Yes.	<i>Shuti v. Lynch</i> , 828 F.3d 440 (6th Cir. 2016)	IMM
7 th	Yes.	<i>United States v. Vivas-Ceja</i> , 808 F.3d 719 (7th Cir. 2015)	SENT
9 th	Yes.	<i>Dimaya v. Lynch</i> , 803 F.3d 1110 (9th Cir. 2015), <i>cert. granted</i> , 137 S. Ct. 31 (Sept. 29, 2016)	IMM
10 th	Yes.	<i>Golicov v. Lynch</i> , 837 F.3d 1065 (10th Cir. 2016)	IMM

SOUNDBITES & QUOTABLE QUOTES

CATEGORICAL APPROACH

“[ACCA] mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” *Taylor v. United States*, 495 U.S. 575, 600 (1990). “[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense ‘necessarily’ involved ... facts equating to [the] generic [federal offense].” *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion)). In the abstract, the categorical approach is an examination of “whether the state statute shares the nature of the federal offense[,] [where the federal offense] serves as a point of comparison.” *Moncrieffe*, 133 S. Ct. at 1685. “The categorical approach serves ‘practical’ purposes: It promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact.” *Id.* at 1690 (citing *Chambers v. United States*, 555 U.S. 122, 129 (2009)).

MINIMUM CONDUCT & REALISTIC PROBABILITY

To determine “what the state conviction necessarily involved [the court] must presume that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense.” *Moncrieffe*, 133 S. Ct. 1678, 1684 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). “[The] focus on the minimum conduct criminalized by the state is not an invitation to apply ‘legal imagination’ to the state offense; there must be ‘a realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside the generic definition of a crime.’” *Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). “[T]he ‘realistic probability’ requirement is not a component of, or adjunct to, the modified categorical approach [...] Rather, it is a *distinct threshold inquiry* that the Court employs to identify the actual ‘minimum conduct’ criminalized by a statute.” *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014) (emphasis added), *order vacated in part on reconsideration by Matter of Chairez-Castrejon*, 26 I&N Dec. 478 (A.G. 2015); *Matter of Chairez-Castrejon*, 26 I&N Dec. 819, 821 n. 2 (BIA 2016). “To show that realistic probability, *an offender* [...] must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.” *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (emphasis added).

DIVISIBLE STATUTES

“We also note[] that the categorical method is not always easy to apply. That is because sometimes a separately numbered subsection of a criminal statute will refer to several different crimes, each described separately.” *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009). “[A] prior conviction for violating a so-called ‘divisible statute[.]’ [...] sets out one or more elements of the offense in the alternative.” *Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013). A divisible statute is one that “lists multiple, alternative elements, and so effectively creates ‘several different...crimes.’” *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013) (quoting *Nijhawan*, 557 U.S. at 41)). “If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach.” *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013).

MODIFIED CATEGORICAL APPROACH

“The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach’s central feature; a focus on the elements, rather than the facts, of a crime[.] [...] [a]ll the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates ‘several different...crimes.’” *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). In this way, “[t]he modified [categorical] approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense *elements* in the alternative, renders opaque which element played a part in the defendant’s conviction.” *Id.* (emphasis added).

“ELEMENTS” VS. “BRUTE FACTS”

“Elements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction’.” *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (quoting Black’s Law Dictionary 634 (10th ed. 2014)). “[A] [] jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant use to commit an element of the crime[,]” but need do so when deciding on the elements of the offense. *Richardson v. United States*, 526 U.S. 813, 817 (1999). “Facts, by contrast are mere real-world things—extraneous to the crime’s legal requirements [...] sometimes called [] ‘brute facts’ when distinguishing them from elements.” *Id.* Brute facts are “circumstance[s] or event[s] having no legal effect [or] consequence: In particular, they need neither be found by a jury nor admitted by a defendant.” *Id.* (quoting Black’s Law Dictionary 709 (10th Ed. 2014)) (internal quotation marks omitted). “[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes.” *Schad v. Arizona*, 501 U.S. 624 (1991) (plurality). To uncover whether an item is an element or brute fact and “determin[e] the nature of an alternatively phrased list” the Supreme Court has instructed that we consider the following: “When a ruling [by a State court as to whether an item is an element] exists, a sentencing judge need only follow what it says. Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments then under *Apprendi* they must be elements. Conversely, if a statutory list is drafted to offer ‘illustrative examples’ then it includes only a crime’s means of commission. And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means). [...] [Lastly,] ‘federal judges[may] ‘peek at the [record] documents’ [] for ‘the sole and limited purpose of determining whether [the listed items are] element[s] of the offense’.” *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016) (quoting *Rendon v. Holder*, 782 F.3d 466, 473-74 (9th Cir. 2015) (Kozinski, C.J., dissenting from denial of reh’g en banc) (alterations in original)).

JUDICIALLY NOTICEABLE CONVICTION DOCUMENTS

“[T]o determine whether a plea of guilty to [a state offense] defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *Shepard v. United States*, 544 U.S. 13, 26 (2005) (plurality opinion) (emphasis added). “With such material in a pleaded case, a later court c[an] generally tell whether the plea had ‘necessarily’ rested on the fact identifying the [offense] as generic, just as the details of instructions could support that conclusion in the jury case.” *Shepard v. United States*, 544 U.S. 13, 20 (2005) (plurality opinion) (internal citations omitted).

ⁱ This update **does not** include cases that examine *Mathis*’ application to enhance sentences under the Armed Career Criminals Act (“ACCA”), 18 U.S.C. § 924(e) (correspond with 18 U.S.C. §§ 924(a), 922(g)), or under the United States Sentencing Guidelines, U.S.S.G. §§ 4B1.2(a), 2L.1, unless those sentencing enhancements relate to 8 U.S.C. § 1326.

IMMIGRATION LAW SERIES:
Appellate Adjudication
Part IV



**RECENT DEVELOPMENTS IN THE
CATEGORICAL APPROACH:
Realistic Probability & Divisibility**



DECEMBER 8, 2016

Learning Objectives

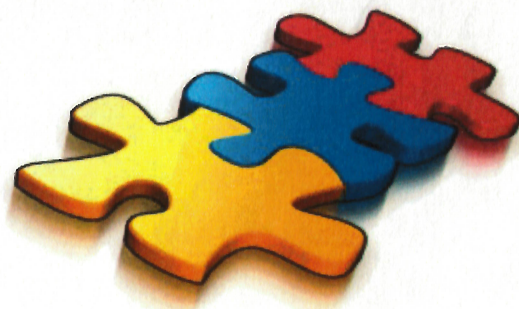


- Understand the importance of recent developments in the criminal/immigration arena
- Understand how and when the concepts of “realistic probability” and “divisibility” are applied
- Understand the framework for applying the categorical and modified categorical approaches

Navigating the Categorical Approach

1

***PRESENTED BY:
JOSH LUNSFORD***



Overview



- The categorical approach is a method of comparison
- The goal is to compare
 - (1) a real offense (the “**actual crime**”) to a
 - (2) hypothetical offense (the “**generic immigration offense**”)
- Unit of comparison

ELEMENTS



Sure it's some kind of burglary,
but is it the right kind of burglary?

Option #1: No Match



Actual
Crime

Generic
Offense

No way to violate the actual statute of conviction that would also satisfy the elements of the generic offense.

Option #2: Categorical Match



Actual Crime
AND Generic
Offense

Every potential way to violate the actual statute of conviction satisfies the elements of the generic offense.

Option #3: Overbroad



The statute covers some conduct that meets the requirements of the generic offense, but some that does not.

Option #3: Overbroad



The statute covers some conduct that meets the requirements of the generic offense, but some that does not.

5-Step Approach

- 1) Applicability
- 2) Defining the crimes
- 3) Breadth
- 4) Divisibility
- 5) Modified categorical approach



Step 1: Applicability



Full application

- Crimes Involving Moral Turpitude
 - ✦ *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016)
- Aggravated felonies (most)
- Firearms offenses
 - ✦ *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014) (“Chairez I”)
- Controlled substance offenses – inadmissibility

Step 1: Applicability



Partial application

- Crimes of domestic violence
 - *Matter of H- Estrada*, 26 I&N Dec. 749 (BIA 2016);
 - *Cf. Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004)
- Agg. Fel. – Fraud/deceit with \$10K loss
- Agg. Fel. – Failure to appear
 - *Matter of Garza-Olivares*, 26 I&N Dec. 736 (BIA 2016)
- Controlled substance offenses – deportability

Step 1: Applicability



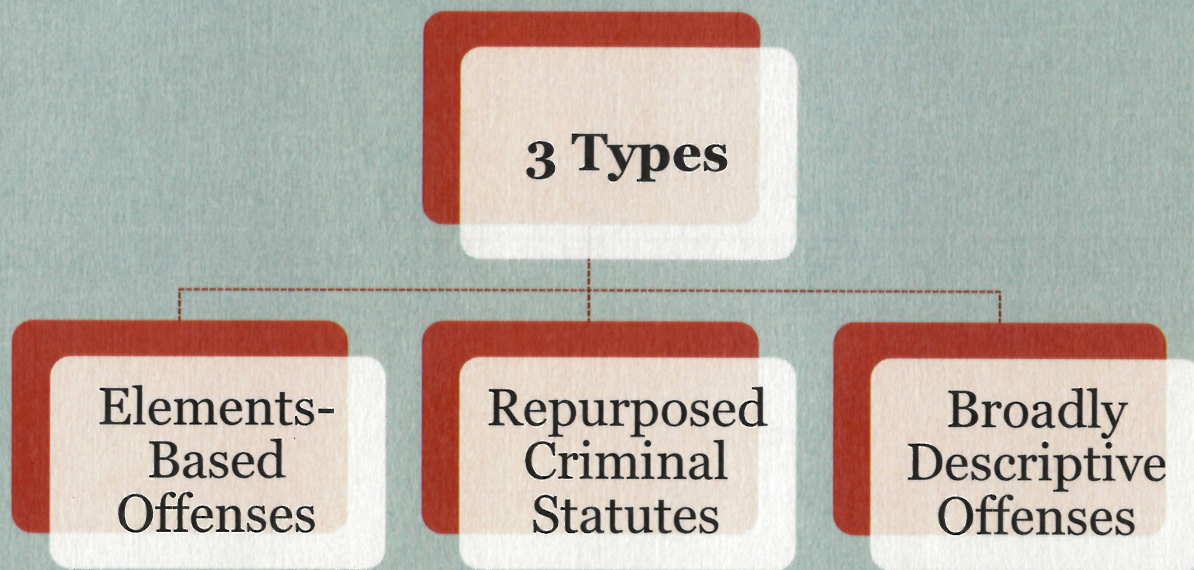
No application

- Particularly serious crimes
- Serious nonpolitical offenses
- Violent or dangerous crimes
- Discretionary determinations

Step 2: Defining the Crimes



Part I: Generic Immigration Offense



Generic Immigration Offenses – Category #1



Elements-based offenses

- Provision that refers to a crime with “traditional elements.”
- The generic “elements” are determined by resort to model rules and/or common law.
- E.g., burglary, theft, murder, and rape.

Generic Immigration Offenses – Category #2



Repurposed criminal statutes

- Cross reference to a criminal statute (e.g., an offense “defined in” or “described in”).
- Generally speaking, the generic “elements” are those that are required by the criminal statute.
 - Jurisdictional elements NOT part of generic offense
 - ✦ *Torres v. Lynch*, 136 S. Ct. 1619 (2016)
 - Sentencing factors and statutory exceptions may be considered “quasi-elements”
 - ✦ *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013)

Generic Immigration Offenses – Category #3



Broadly descriptive offenses

- A provision of the INA that describes a broad class of offenses that share *common characteristics*.
- The common characteristics serve as the “elements.”
- E.g., “a crime of child abuse”

Step 2: Defining the Crimes



Part II: **Actual Crime**

- Is generally defined by statute (unless common law)
 - Must focus on the version of the crime that existed *at the time of commission*
- Coverage may be modified by case law
- Model jury instructions will often cross-reference relevant case law

Hypo # 1



Aggravated assault as a “firearms” offense

Generic Firearms Offense



Section 237(a)(2)(C) applies to:

- ✦ purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring . . .
- ✦ “a firearm” as defined by 18 U.S.C. § 921(a)

Section 921(a) defines “firearm” as:

- ✦ any weapon that “is designed to or may readily be converted to expel a projectile by the action of an explosive”
- ✦ However, the statute explicitly excludes “antique firearms”

Generic Offense
(1) Use/Attempted Use
(2) A Firearm
(3) Not Antique

Actual Crime



ARS § 13-1204(A)(2) (Aggravated Assault):

A general assault becomes aggravated if the person “uses a deadly weapon or dangerous instrument.”

- Deadly weapon: “anything that is designed for lethal use, including a firearm”
- Dangerous instrument: “anything that under the circumstances in which . . . is readily capable of causing death or serious physical injury.”

Questions to ask:

- Would every conviction involve a “firearm”?
- Would every conviction involve “non-antique” firearms?

What now?



Breadth & Realistic Probability

2

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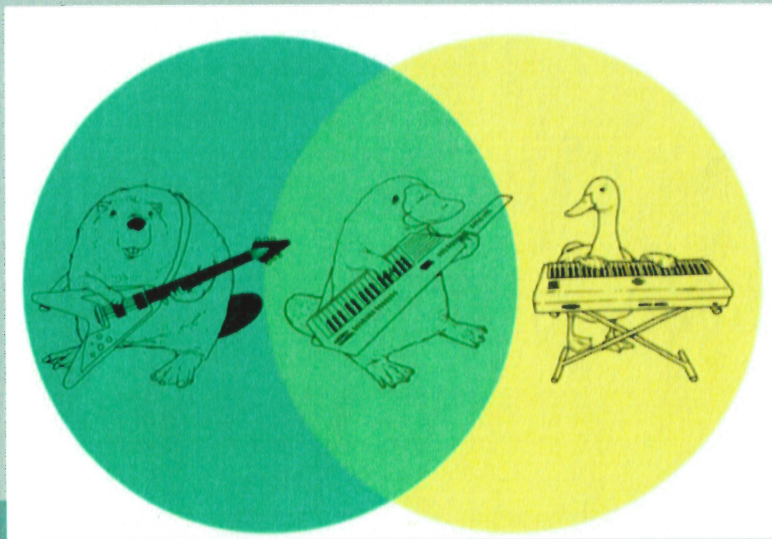


- a counterintuitive rule
- a time-consuming legal tangle
- mind-bending in its application
- an endless gauntlet of abstract legal questions

The Main Objective



**Simply comparing a
generic immigration offense
with an
actual crime**



5-Step Approach



- 1) Applicability*
- 2) Defining the crimes*
- 3) Breadth*
- 4) Divisibility*
- 5) Modified categorical approach*



Step 1: Applicability



- What is the relevant **generic immigration offense**?
- Sources:
 - NTA, Form(s) I-261 – removability at issue
 - Immigration Judge decision – eligibility for relief at issue

Step 1: Applicability



- Does the categorical approach apply to the relevant **generic immigration offense**?
- Defined by case law
- There are three options:



Step 1: Applicability



- **Full application**

- Crimes Involving Moral Turpitude
- Aggravated felonies (most)
- Firearms offenses
- Controlled substance offenses (inadmissibility)

- **No application**

- Particularly serious crimes
- Serious nonpolitical offenses
- Violent or dangerous crimes
- Discretionary determinations

- **Partial application**

- Crimes of domestic violence
- Fraud/deceit with \$10K loss
- Failure to appear
- Controlled substance offenses (deportability)

Step 1: Applicability



- **Partial Application** – Part of the immigration statute requires the categorical approach, part of it does not
- The language of the immigration statute calls for a circumstance-specific inquiry beyond the elements of the offense

Step 1: Applicability



- **Partial Application** – Examples:
 - Usually aggravating factors:
 - Sentence imposed – i.e. crime of violence + 1 year
 - Amount of funds – INA § 101(a)(43)(D) (money laundering)
 - Loss to victim – INA § 101(a)(43)(M)(i) (fraud or deceit)
 - Failure to appear pursuant to a court order; to answer or dispose of a felony charge; for which sentence of 2 years or more may be imposed - INA § 101(a)(43)(T)
 - Protected domestic relationship – INA § 237(a)(2)(E)(i) (crime of domestic violence)
- Personal use exception under INA § 237(a)(2)(B)(i)
 - Possession of ≤ 30 g. of marijuana for one's own use

Step 1: Applicability



- **Partial Application** – “Circumstance-specific approach”
- Allows the adjudicator to examine the specific facts surrounding the offense to determine whether it meets the language of the immigration statute
- Evidence beyond that which would be admissible under the categorical approach can be considered—i.e. any evidence that is otherwise admissible in removal proceedings

Practice Tip



Partial Application – Consider reviewing the application of the circumstance-specific approach first. There is no need to engage in the challenges of the categorical approach if the required circumstances are not present.

5-Step Approach

- 1) **Applicability**
- 2) *Defining the crimes*
- 3) **Breadth**
- 4) **Divisibility**
- 5) **Modified categorical approach**



Step 2: Defining the Crimes

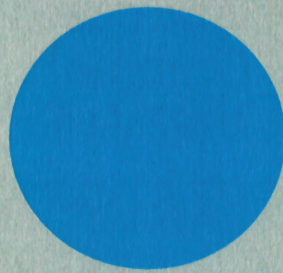


**Simply comparing a
generic immigration offense
with an
actual crime**

Step 2: Defining the Crimes



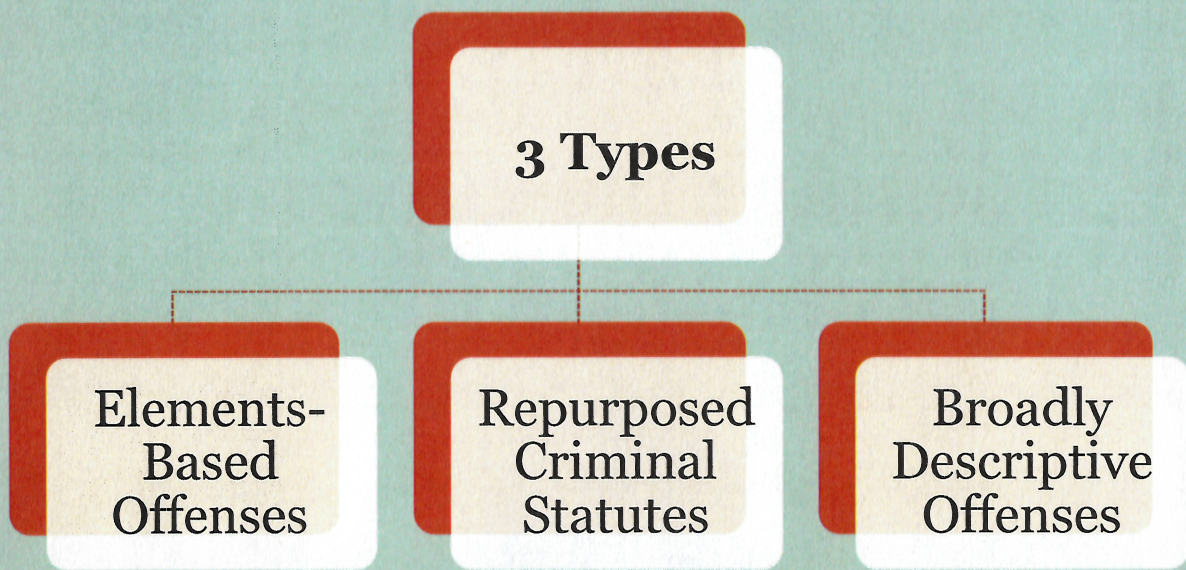
Part I:
defining the **generic
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Step 2: Defining the Crimes



Part I: Generic Immigration Offense



Step 2: Defining the Crimes

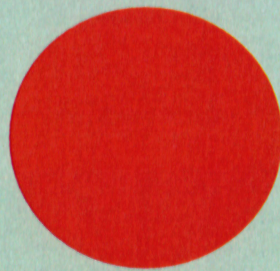


- How is the **generic immigration offense** defined?
 - **Elements-based** offense defined by common law (e.g. burglary, theft, murder, rape)
 - **Repurposed criminal statute** via cross-reference (e.g. firearms offense 18 U.S.C. § 921(a))
 - **Broadly descriptive offense** (e.g. CIMT, child abuse)
 - **Combination** – illicit trafficking (broadly descriptive) in a controlled substance (as defined in the CSA) (cross-reference), including a drug trafficking crime under 18 U.S.C. § 924(c) (cross-reference)

Step 2: Defining the Crimes



Part II:
defining the **actual crime**



Step 2: Defining the Crimes



- What is the **actual crime**?
- Sources:
 - Record of conviction
 - NTA – how is the crime alleged? Has there been an admission?
 - Determination by Immigration Judge in the record/decision
 - Reference to crime in appeal brief, motions, and/or memoranda
 - Sentence imposed indicates subsection of statute violated

Step 2: Defining the Crimes



- What is the language of the **actual crime**?
- Date of offense
 - Judgment, criminal charging document
 - NTA – is the date alleged? Has there been an admission?
 - Determination by Immigration Judge in the record/decision
 - Reference to date of offense in appeal brief, motions, and/or memoranda



Step 2: Defining the Crimes



- Locate the historical version of the **actual crime**
 - Is the applicable version in the record of proceedings?
 - Locate the historical version on Westlaw via the “Effective Date” function or “the “History” tab
 - If older than the available versions on Westlaw, reference the “Credit(s)” section in the oldest version

Step 2: Defining the Crimes



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Arkansas Rules of Criminal Procedure
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New Jersey - Title 2C - The New Jersey Code of Criminal Justice

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Federal Sentencing Guidelines Manual
Model Penal Code: Sentencing

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- ☐ § 22.012. Deleted by Acts 1993, 73rd Leg., Ch. 900, § 1.01, eff. Sept. 1, 1994
- ☐ § 22.015. Repealed by Acts 2009, 81st Leg., Ch. 435, § 3, eff. Sept. 1, 2009
- ☐ § 22.02. Aggravated Assault
- ☐ § 22.021. Aggravated Sexual Assault
- ☐ § 22.03. Deleted by Acts 1993, 73rd Leg., Ch. 900, § 1.01, eff. Sept. 1, 1994
- ☐ § 22.04. Injury to a Child, Elderly Individual, or Disabled Individual
- ☐ § 22.041. Abandoning or Endangering Child

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the offense or entered a plea of guilty or nolo contendere in return for a grant of deferred adjudication, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the defendant was subsequently discharged from community supervision.

Credits

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1977, 65th Leg., 1st C.S., p. 55, ch. 2, §§ 12, 13, eff. July 22, 1977; Acts 1979, 66th Leg., p. 260, ch. 135, §§ 1, 2, eff. Aug. 27, 1979; Acts 1979, 66th Leg., p. 367, ch. 164, § 2, eff. Sept. 1, 1979; Acts 1983, 68th Leg., p. 5311, ch. 977, § 1, eff. Sept. 1, 1983; Acts 1987, 70th Leg., ch. 1052, § 2.08, eff. Sept. 1, 1987; Acts 1989, 71st Leg., ch. 739, §§ 1 to 3, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., ch. 14, § 284(23) to (26), eff. Sept. 1, 1991; Acts 1991, 72nd Leg., ch. 334, § 1, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., ch. 366, § 1, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994; Acts 1997, 75th Leg., ch. 165, § 27.01, eff. Sept. 1, 1997.

Amended by Acts 1995, 74th Leg., ch. 318, § 5, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 659, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 165, §§ 27.01, 31.01(68), eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 62, § 15.02(a), eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1158, § 1, eff. Sept. 1, 1999.

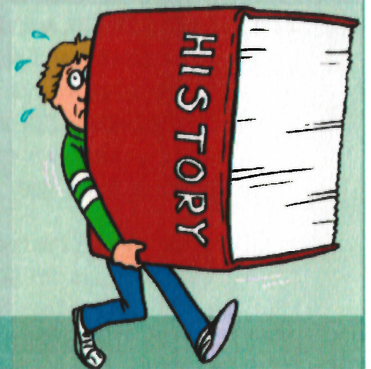
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Current through the end of the 2015 Regular Session of the 84th Legislature

Step 2: Defining the Crimes



- Does the **actual crime** have relevant companion statutes?
 - Examples:
 - ✦ Statutes that provide definitions
 - ✦ Controlled substance schedules
 - ✦ Sentencing statutes
 - Must also be historical!!!



5-Step Approach



- 1) **Applicability**
- 2) **Defining the crimes**
- 3) ***Breadth***
- 4) **Divisibility**
- 5) **Modified categorical approach**



Step 3: Breadth



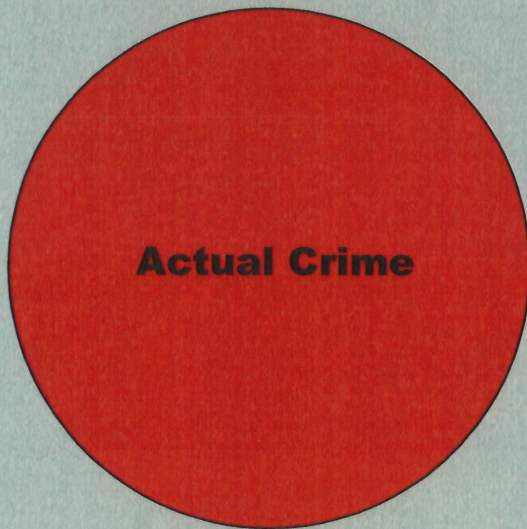
Simply comparing
a **generic immigration offense**
with an **actual crime**. . . there are only three
possible outcomes



Step 3: Breadth



The **generic immigration offense** and the **actual crime** do not overlap



Step 3: Breadth



The **generic immigration offense** *covers all*
conduct under the **actual crime**



Step 3: Breadth



The **actual crime** is *broad*er than the **generic immigration offense**



Step 3: Breadth



Method of comparison:

**The “realistic
probability” test***

*unless circuit case law dictates otherwise

The “Realistic Probability” Test



- Determination of “the ***minimum conduct*** that has a ***realistic probability*** of being prosecuted under the statute of conviction”
- This is the threshold determination in the categorical approach
- The respondent bears the burden of proof to demonstrate that there is a ***realistic probability*** that the ***minimum conduct*** of his or her ***actual crime*** is broader than the definition of the **generic immigration offense**
- Review circuit case law for application

Step 3: Breadth



How do we determine whether the respondent has met his or her burden to show that such a ***realistic probability*** exists?



Step 3: Breadth



Evidence must indicate the **actual crime** has, in fact, been ***successfully*** applied to prosecute conduct which is outside the definition of the **generic immigration offense**

OVERBROAD

Step 3: Breadth



- Sources demonstrating a “realistic probability”:
 - State cases
 - ✦ Unpublished decisions OK
 - Jury instructions
 - The respondent’s own case – only the facts established

Step 3: Breadth



- Evolving source: Plain reading of the statutory text of the **actual crime**
 - To date, only applied in cases where the respondent argued that the **actual crime** is broader than the definition of the **generic immigration offense**
 - *Examples*
 - *Singh v. Att’y Gen. of U.S.*, 839 F.3d 273 (3d Cir. 2016)
 - *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015)
 - *Ramos v. U.S. Att’y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013)

Step 3: Breadth



- NOT Sources:
 - Theoretical possibility
 - Cases demonstrating unsuccessful prosecution
 - Claims about the circumstances of the offense not found by judge/jury to be fact or not incorporated into the plea agreement

REJECTED “Realistic Probability”

- **Two circuits have rejected the “realistic probability test in the CIMT context:**
- **Third Circuit** – “least culpable conduct” approach
 - *Mahn v. Att’y Gen. of U.S.*, 767 F.3d 170 (3d Cir. 2014);
Jean-Louis v. Att’y Gen. of U.S., 582 F.3d 462 (3d Cir. 2009)
- **Fifth Circuit** – “minimum reading” approach
 - *Gomez–Perez v. Lynch*, 829 F.3d 323, 327 (5th Cir. 2016);
Mercado v. Lynch, 823 F.3d 276, 278-79 (5th Cir. 2016);
Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006)

Hypo #2



Tampering with records under Iowa law
as a CIMT

History



- In 1999, the respondent partied like the year that it was and tampered with records in violation of Iowa Code § 715A.5. The respondent was convicted of this offense.
- The DHS initiates removal proceedings against the respondent, he concedes he is subject to removal under INA § 212(a)(6)(A)(i), and applies for cancellation of removal under INA § 240A(b)(1).
- IJ finds his conviction under Iowa Code § 715A.5 makes him statutorily ineligible pursuant to INA § 240A(b)(1)(C) because he has been convicted of an offense under INA § 212(a)(2) – a CIMT under INA § 212(a)(2)(A)(i)(I), the respondent appeals.

Step 1: Applicability



- What is the relevant **generic immigration offense**?
- IJ determines the respondent's offense is a CIMT under INA § 212(a)(2)(A)(i)(I)
- Applicability - CIMTs require the full application of the categorical approach. *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016)

Step 2: Defining the Crimes



- **Part I:** How is the **generic immigration offense** defined?
- Broadly descriptive offense
- Based on case law, CIMTs include:
 - crimes committed intentionally or **knowingly**.
 - crimes involving the **intent to deceive** or defraud
 - non-fraudulent crimes involving an **intent to injure**
 - crimes involving intentional **concealing of criminal behavior**

Step 2: Defining the Crimes



- **Part II:** What is the **actual crime**?
- Sources:
 - There is a record of conviction in the ROP stating that the respondent was convicted under Iowa Code § 715A.5
 - IJ found that the respondent committed the crime in 1999
 - Both parties reference these facts in their briefs

Step 2: Defining the Crimes



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715A.5. Tampering with records
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Versions (1)
Editor's and Revisor's Notes (0)
Bill Drafts (0)
Legislative History Materials (0)

Iowa Code Annotated
Title XVI. Criminal Law and Procedure
Subtitle 1. Crime Code
Chapter 715A. Forgery and Tampering

Annos)
(Refs & Annos)
cts (Refs & Annos)

NOTES OF DECISIONS (7)
False documents
Knowledge or intent
Sufficiency of evidence

I.C.A. § 715A.5

715A.5. Tampering with records

Currentness

A person commits an aggravated misdemeanor if, knowing that the person has no privilege to do so, the person falsifies, destroys, removes, or conceals a writing or record, with the intent to deceive or injure anyone or to conceal any wrongdoing.

Credits
Added by Acts 1987 (72 G.A.) ch. 150, § 5.

Notes of Decisions (7)

I. C. A. § 715A.5, IA ST § 715A.5
Current with legislation from the 2016 Reg.Sess.

Step 2: Defining the Crimes



- **Step II:** What is the **actual crime**?
- Language: “A person commits an aggravated misdemeanor if, knowing that the person has no privilege to do so, the person falsifies, destroys, removes, or conceals a writing or record, with the intent to deceive or injure anyone or to conceal any wrongdoing.”

Step 3: Breadth



- What is the breadth of the **actual crime**?
- Does it apply to acts that are not CIMTs?
- Language: “A person commits an aggravated misdemeanor if, **knowing** that the person has no privilege to do so, the person falsifies, destroys, removes, or conceals a writing or record, **with the intent to deceive or injure** anyone or to **conceal any wrongdoing**.”

Step 3: Breadth



- Are you using your legal imagination to assess the statute?



Step 3: Breadth



Bottom line:

Did the **respondent** establish that there is a realistic probability that the **actual crime** has been successfully applied to prosecute conduct that is not a CIMT (the **generic immigration offense**)?

Step 3: Breadth



- The respondent provides a redacted indictment which alleges that the defendant knowingly destroyed a record with the intent to deceive the victim and the judgment from that case which indicates the State was ultimately unsuccessful in prosecuting the defendant under Iowa Code § 715A.5.
- Did the respondent establish realistic probability that Iowa Code § 715A.5 applies to acts that are not CIMTs ?
 - *See Matter of Mendoza-Osorio*, 26 I&N Dec. 703, 707 n. 4 (BIA 2016) (unsuccessful prosecution has no probative evidentiary weight in the reasonable probability analysis).

Step 3: Breadth



- The respondent submits an unsworn statement from the victim, his ex-girlfriend, which states, “He never intended to deceive or injure anyone, or conceal any wrongdoing. I just pressed charges because he was texting my sister.”
- Did the respondent establish a realistic probability that Iowa Code § 715A.5 applies to acts that are not CIMTs ?

Step 3: Breadth



- The respondent submits on appeal an affidavit from a prosecutor in Iowa which claims, “I have successfully prosecuted cases under Iowa Code § 715A.5 where the defendant recklessly destroyed a record without the intent to deceive or injury anyone or conceal any wrongdoing.” No case numbers or transcripts are provided.
- Did the respondent establish a realistic probability that Iowa Code § 715A.5 applies to acts that are not CIMTs ?

Step 3: Breadth



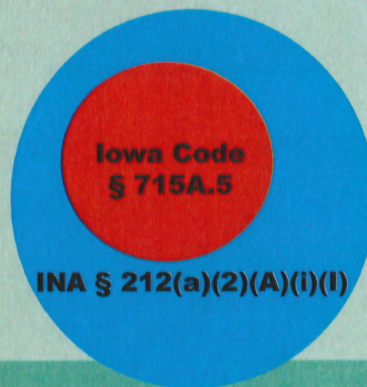
- What actually happened - The respondent submitted case in which the defendant was successfully prosecuted under Iowa Code § 715A.5 for having signed a subpoena which stated he served a witness in his own criminal trial when he actually hadn't. The defendant claimed he had intended to serve the witness shortly thereafter, but instead gave it to her classmate.
- Did the respondent establish realistic probability that Iowa Code § 715A.5 applies to acts that are not CIMTs ?
- No, based on the facts of the case, the criminal court repeatedly characterized the defendant's intent in signing the subpoena as an "intent to deceive."
 - *Villatoro v. Holder*, 760 F.3d 872 (8th Cir. 2014)

Step 3: Breadth



RESULT:

The respondent did not meet his burden to establish that there is a realistic probability that **Iowa Code § 715A.5** would apply to conduct that is not a **CIMT**. The **actual crime** is not overbroad as an offense under **INA § 212(a)(2)(A)(i)(I)**.



Step 3: Breadth



NEXT UP:

The respondent establishes that there is a realistic probability that the **actual crime** is **broad**er than the **generic immigration offense**

The word "OVERBROAD" is written in a large, bold, black serif font. The letters are partially obscured by three overlapping circles: a red circle behind the "O", a teal circle behind the "V", and another red circle behind the "O".

OVERBROAD

Divisibility & The Modified Categorical Approach

3

***PRESENTED BY:
JOHN CROSSETT***



5-Step Approach



- 1) Applicability
- 2) Defining the crimes
- 3) Breadth
- 4) *Divisibility*
- 5) *Modified categorical approach*



Practice Tip



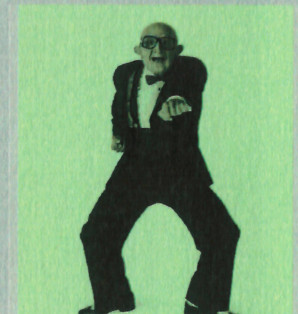
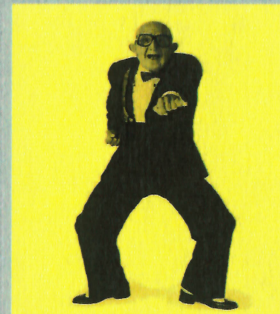
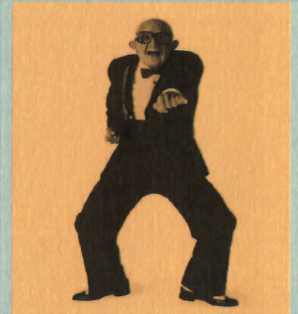
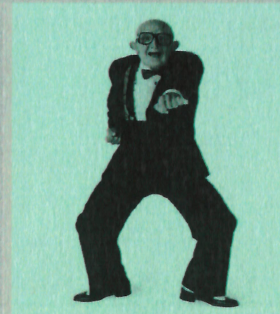
Let the parties' arguments, concessions, and stipulations guide your analysis. Don't get into the weeds of divisibility issues unless the parties are asking you to.

“The Good Ol’ Days”



Matter of Lanferman, 25 I&N
Dec. 721 (BIA 2012)

“A criminal statute is divisible,
regardless of its structure, if,
based on the elements of the
offense, some but not all
violations of the statute give rise
to grounds for removal or
ineligibility for relief.”



“A Brave New World”



Descamps v. United States,
133 S. Ct. 2276 (2013)

“A Brave New World”



Descamps v. United States, 133 S. Ct. 2276 (2013)

- A modified categorical inquiry is impermissible unless the offense of conviction is formally “divisible.”
- An offense is not divisible merely because it is broader than the generic immigration crime.

“A Brave New World”



Descamps v. United States, 133 S. Ct. 2276 (2013)

In effect, *Descamps* establishes a presumption against use of the modified categorical approach.



This presumption can be rebutted.....



ONLY if the alien's offense of conviction is "DIVISIBLE."

Step 4: Divisibility



Mathis v. United States,
136 S. Ct. 2243 (2016)

Step 4: Divisibility



Mathis v. United States, 136 S. Ct. 2243 (2016)

An overbroad offense is “divisible” only if:

- (1) It is defined in the alternative;
- (2) At least one alternative, but not all, categorically matches the generic immigration crime; AND
- (3) Each alternative defines a distinct offense “element.”

Offense is
DIVISIBLE if

Defined in the
Alternative

At least one
alternative, but not
all, categorically
matches immigration
offense AND

Each alternative
defines a distinct
offense “element”

Mathis Requirement #1: Offense Defined In the Alternative



An offense may be defined in the alternative if it contains:

- (1) Multiple numbered subparts; and/or
- (2) Disjunctive phrases (“or” clause); and/or
- (3) Terms of art that are defined disjunctively in other sections; and/or
- (4) Variable sentencing provisions.

Mathis Requirement #3: Alternatives Must Define “Elements” Rather than “Brute Facts”



Tex. Penal Code § 22.01. Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

(1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty....

Tex. Penal Code § 1.07(8)

“Bodily injury” means physical pain, illness, or any impairment of physical condition

Mathis Requirement #3: Alternatives Must Define “Elements” Rather than “Brute Facts”



Tex. Penal Code § 22.01. Assault

(a) A person commits an offense if the person:

- (1) intentionally, knowingly, **or** recklessly causes bodily injury to another, including the person's spouse;
- (2) intentionally **or** knowingly threatens another with imminent bodily injury, including the person's spouse; or
- (3) intentionally **or** knowingly causes physical contact with another when the person knows **or** should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

- (1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty....

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Tex. Penal Code § 1.07(8)

“Bodily injury” means physical pain, illness, or any impairment of physical condition

Mathis Requirement #1: Offense Defined In the Alternative



An offense also *may* be defined in the alternative under *Mathis* if it:

(1) Has a disjunctive “common law” definition.

- *E.g., United States v. Redrick*, 2016 WL 6595973 (D.C. Cir. Nov. 8, 2016) (Maryland robbery)

(2) Is a general inchoate offense (attempt, conspiracy, solicitation) or requires the commission of other offenses.

- *E.g., Franco-Casasola v. Holder*, 773 F.3d 33 (5th Cir. 2014) (smuggling under 18 U.S.C. § 554)

Mathis Requirement #1: Offense Defined In the Alternative

Offense is
DIVISIBLE if

Defined in the
Alternative

If it contains either:

Multiple
numbered
subparts

Disjunctive phrases

Terms of art that are defined
disjunctively in other sections

Variable sentencing provisions

Disjunctive common law
definition?

General inchoate offense or
requiring commission of
another offense?

At least one
alternative, but not
all, categorically
matches immigration
offense AND

Each alternative
defines a distinct
offense "element"

Mathis Requirement #2: At Least One Alternative Is A Categorical Match



At least one alternative, but not all, must categorically match the generic immigration crime.

- If all alternatives match, then a modified categorical inquiry is unnecessary.
- If none of the alternatives matches, then a modified categorical inquiry is impermissible.

Summary of Requirements 1 and 2

Offense is
DIVISIBLE if

Defined in the
alternative

General inchoate offense
or requiring commission of
another offense?

If it contains either:

Disjunctive common law definition?

Multiple numbered subparts

Disjunctive phrases

Terms of art that are defined
disjunctively in other sections

Variable sentencing provisions

At least one
alternative, but not
all, categorically
matches immigration
offense AND

If all alternatives match:

MCA not
necessary

If no alternatives match:

MCA
impermissible

Each alternative defines
a distinct offense
"element"

Practice Tip



Check the **conviction record** to see whether it is helpful. If it is silent or shows that the respondent was convicted of an alternative that does not match our generic immigration crime, then there's no point in going further. Even assuming the statute is divisible, applying the modified categorical approach would not help us to narrow down the respondent's offense.

Mathis Requirement #3: Alternatives Must Define “Elements” Rather than “Brute Facts”



Each alternative statutory subpart or term must define a distinct offense “**element**,” rather than a mere “**brute fact**” or “**means**” of satisfying a broad element.

Mathis Requirement #3: Alternatives Must
Define “Elements” Rather than “Brute Facts”



“[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes.”

Schad v. Arizona, 501 U.S. 624, 636 (1991)

Mathis Requirement #3: Alternatives Must Define “Elements” Rather than “Brute Facts”



“Elements” are facts about a crime that a jury must find, unanimously and beyond a reasonable doubt, in order to render a lawful guilty verdict.

Descamps v. United States, 133 S. Ct. 2276, 2288 (2013)

“Brute facts,” by contrast, are “mere real-world things”—they have no legal consequence and need neither be found by a jury nor admitted by a defendant.

Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)

Mathis Requirement #3: Alternatives Must Define “Elements” Rather than “Brute Facts”



How to distinguish “elements” from “brute facts”

(1) *Statutory text* – if statutory alternatives are listed as “illustrative examples,” then they are NOT elements. Be on the lookout for the words “includes” or “including.”

- *E.g., United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. 2013) (“‘Sexual abuse’ **includes**, but is not limited to ... [i]ncest, rape, or sexual offense in any degree”).

Mathis Requirement #3: Alternatives Must
Define “Elements” Rather than “Brute Facts”



How to distinguish “elements” from “brute facts”

(2) *Case law* from the convicting jurisdiction –
Be on the lookout for state cases discussing...

- *Schad v. Arizona*, 501 U.S. 624 (1991), or
- *Richardson v. U.S.*, 526 U.S. 813 (1999).

Mathis Requirement #3: Alternatives Must
Define “Elements” Rather than “Brute Facts”



How to distinguish “elements” from “brute facts”

(3) Sentencing Provisions – any fact (other than a prior conviction) that increases the basic penalty that may be imposed for an offense is an “element” that must be proven to the jury beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)

Mathis Requirement #3: Alternatives Must Define “Elements” Rather than “Brute Facts”



Tex. Penal Code § 22.01. Assault

(a) A person commits an offense if the person:

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(b) An offense under Subsection (a)(1) is a Class A misdemeanor, **except that the offense is a felony of the third degree if** the offense is committed against:

(1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty....

Mathis Requirement #3: Alternatives Must Define “Elements” Rather than “Brute Facts”



How to distinguish “elements” from “brute facts”

(4) “*Peeking*” at the conviction record –

This “peek” is not a modified categorical inquiry; the conviction record—especially the charging document—is considered only to shed light on whether statutory alternatives are “elements.”

- If the charging document lists all statutory alternatives, or none, then the alternatives cannot be elements.
- If the charging document lists one statutory alternative to the exclusion of the others, then the alternatives may be elements.

Mathis Requirement #3: Alternatives Must Define “Elements” Rather than “Brute Facts”



How to distinguish “elements” from “brute facts”

(5) Model Jury Instructions –

Although model jury instructions can be useful, they are not “law” and they can be variable in their reliability, so treat them with caution. *Mathis* did not discuss them as a potential source of information about resolving the “elements” versus “brute facts” distinction.

Summary of Requirements 1, 2 and 3

Offense is
DIVISIBLE if

Defined in the
alternative

General inchoate offense
or requiring commission
of another offense?

Disjunctive common
law definition?

Multiple numbered subparts

Disjunctive phrases

Terms of art that are defined
disjunctively in other sections

Variable sentencing provisions

If it contains
either:

At least one
alternative, but not
all, categorically
matches immigration
offense AND

If all
alternatives
match:

MCA not
necessary

If no
alternatives
match:

MCA
impermissible

Each alternative defines
a distinct offense
"element"

How to distinguish
"elements" from
"brute facts"

Statutory Text

Case Law

Sentencing Provisions

Peek at the
Record

Model Jury Instructions?

5-Step Approach



- 1) Applicability
- 2) Defining the crimes
- 3) Breadth
- 4) Divisibility
- 5) *Modified categorical approach*



Step 5: Modified Categorical Approach The Record of Conviction



If the statute of conviction is divisible, look to the **record of conviction** to identify the respondent's offense of conviction:

- Judgment
- Charging document (indictment, information, complaint)
- Jury instructions (if conviction resulted from jury trial)
- Signed plea agreement (if conviction resulted from plea)
- Transcript of plea colloquy
- Factual findings by trial judge
- Any comparable judicial records
 - **Includes** “abstracts of judgment” and “minute orders”
 - **Excludes** police reports and presentence reports.

Conclusion

4

***PRESENTED BY:
JOSH LUNSFORD***



Hypo #3



Aggravated Assault under California law
as a “firearms” offense

Applying the 5 Steps



Step 1: CAT applies

- *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014) (“Chairez I”)

Step 2: Defining the Crimes . . .



Generic Firearms Offense



Section 237(a)(2)(C) applies to:

- purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring . . .
- “a firearm” as defined by 18 U.S.C. § 921(a)

Section 921(a) defines “firearm” as:

- any weapon that “is designed to or may readily be converted to expel a projectile by the action of an explosive”
- However, the statute explicitly excludes “antique firearms”

Generic Offense
(1) Use/Attempted Use
(2) A Firearm
(3) Not Antique

Actual Crime – CPC § 245(a)



(a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 16880, or an assault weapon, as defined in Section 30510 or 30515, or a .50 BMG rifle, as defined in Section 30530, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

(4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

Step 3: Breadth of (a)(1)



(a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

Conclusion: (a)(1) overbroad

Step 3: Breadth of (a)(2)



(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

- California's definition of "firearm" does not *exclude* "antiques"
- *Medina-Lara v. Holder*, 771 F.3d 1106 (9th 2014) (citing actual prosecutions where the definition of "firearm" extended to antique firearms)

Conclusion: (a)(2) likely overbroad

Step 3: Breadth of (a)(3)



(3) Any person who commits an assault upon the person of another with a machinegun, as defined in [Section 16880](#), or an assault weapon, as defined in [Section 30510](#) or [30515](#), or a .50 BMG rifle, as defined in [Section 30530](#), shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

- CA defines a “**machine gun**” as an automatic weapon that fires fixed ammunition.
 - A **generic “antique”** refers to a firearm manufactured prior to 1898 (or a replica of such) that is not designed for fixed ammunition.
- CA’s definition of assault weapons and BMG rifles includes an exception for “antique firearms,” and adopts the Federal definition

Conclusion: (a)(3) likely a match

Step 3: Breadth of (a)(4)



(4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

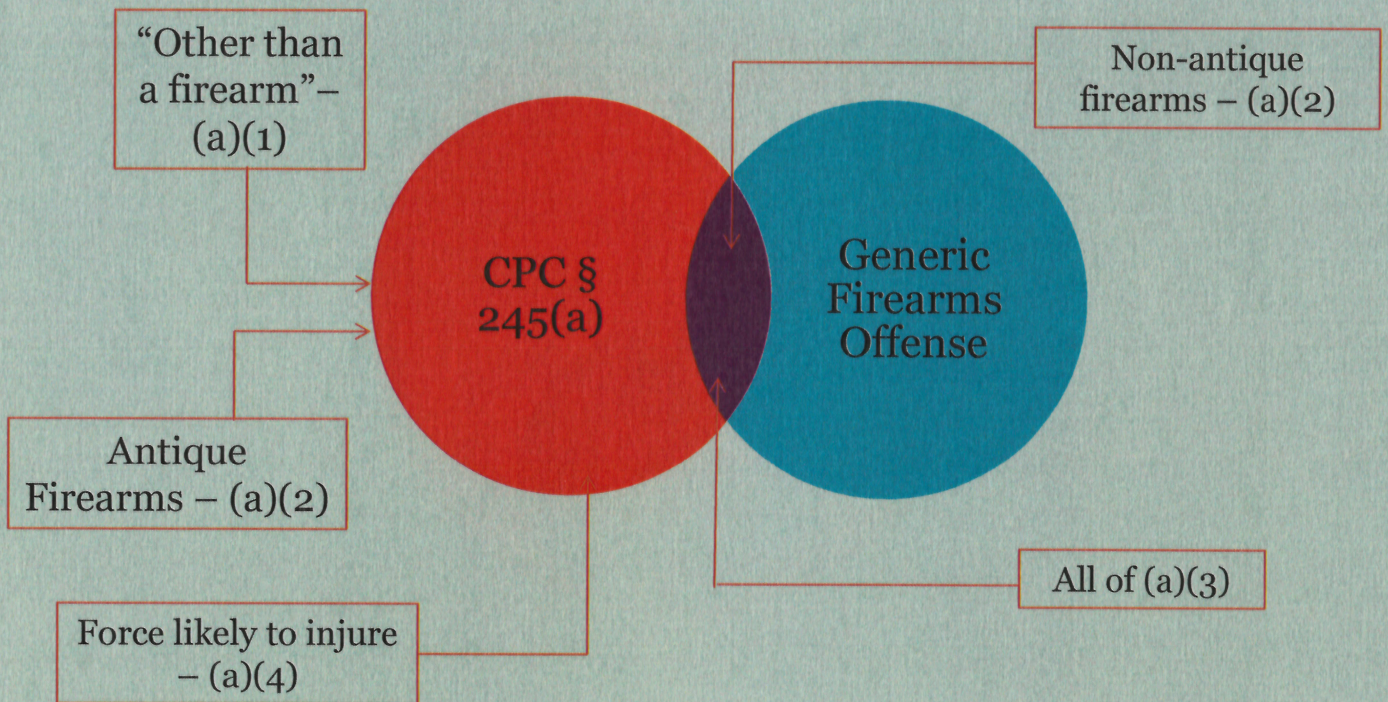
Conclusion: (a)(4) overbroad

Recap



- 245(a)(1): Deadly weapon “other than a firearm”
 - ✦ Overbroad!
- 245(a)(2): Firearm
 - ✦ Overbroad!
- 245(a)(3): Certain machine guns and assault weapons
 - ✦ Match!
- 245(a)(4): Force likely to cause great bodily injury
 - ✦ Overbroad!

Recap



Step 3: Breadth



CPC § 245(a)

Generic
Firearms
Offense

Step 4: Divisibility



As between various subsections:

§ 245. Assault with deadly weapon or force likely to produce great bodily injury; punishment

Currentness

- (a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.
- (2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.
- (3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 16880, or an assault weapon, as defined in Section 30510 or 30515, or a .50 BMG rifle, as defined in Section 30530, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.
- (4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

Step 4: Divisibility



As between various subsections:

- Differentiated by subsections – (a)(1), (a)(2), etc.
- Possible sentences differ with each offense
 - (a)(1): up to 4 years in jail/prison
 - (a)(2): a mandatory minimum of 6 months, but not exceeding 4 years
 - (a)(3): a mandatory sentence of 4-12 years
 - (a)(4): up to 4 years in jail/prison

Conclusion: Likely divisible

Step 4: Divisibility



As between different types of firearms under (a)(2):

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.



Sentences unrelated to type of firearm

Step 4: Divisibility



As between different firearms under (a)(2):

- (a)(2) does not distinguish between “non-antique” and “antique” firearms
- Possible sentences for (a)(2) violation the same regardless of type of firearm

Conclusion: Not divisible

Step 5: MCA



- The MCA may be applied to determine which subsection – (a)(1), (a)(2), (a)(3), or (a)(4) – formed basis of conviction.
- The MCA may **not** be applied to determine what type of firearm was used to violate (a)(2).
- If conviction documents establish the offense to be under:
 - (a)(1) – Deadly weapon other than firearm: NO
 - (a)(2) – Firearm: NO (due to antique firearms)
 - (a)(3) – Rifle or machine gun: YES
 - (a)(4) – “Force likely to . . .”: NO

Hypo #4



Assault under Arizona law
as a “crime of domestic violence”

Applying the 5 Steps



Step 1: CAT partially applies

- ✦ *Matter of H- Estrada*, 26 I&N Dec. 749 (BIA 2016)
- ✦ *Cf. Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004)

Step 2: Defining the Crimes . . .

Generic Immigration Offense



Crime of domestic violence:

(1) a crime of violence under 18 USC § 16

- § 16(a): has as an element the use, attempted use, or threatened use of physical force against the person or property of another

(2) that is committed against a member of one of the listed classes of victims (i.e., that is “domestic” in nature)

Actual Crime – ARS § 13-1203(A)



13-1203. Assault; classification

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult or provoke such person.

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

Step 3: Breadth of (A)(1)



13-1203. Assault; classification

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or

- Under Ninth Circuit precedent:
 - ✦ “Intentionally” or “knowingly” causing physical injury is sufficient
 - ✦ “Recklessly” doing so, however, is not
- But ...
 - ✦ *Voisine v. United States*, 136 S. Ct. 872 (2016)
 - ✦ *Matter of Chairez*, 26 I&N Dec. 819, 822 n.3 (BIA 2016) (“Chairez III”) (noting *Voisine* but following controlling circuit law that holds recklessness to be insufficient)

Conclusion: Most, if not all, conduct covered by (A)(1) likely falls within the definition of a COV under 16(a)

Step 3: Breadth of (A)(2)



13-1203. Assault; classification

A. A person commits assault by:

2. Intentionally placing another person in reasonable apprehension of imminent physical injury;

- “Intentionally placing another in reasonable apprehension”
- 16(a): “threatened use of physical force”

Conclusion: All conduct covered by (A)(2) likely falls within the definition of a COV under 16(a)

Step 3: Breadth of (A)(3)



13-1203. Assault; classification

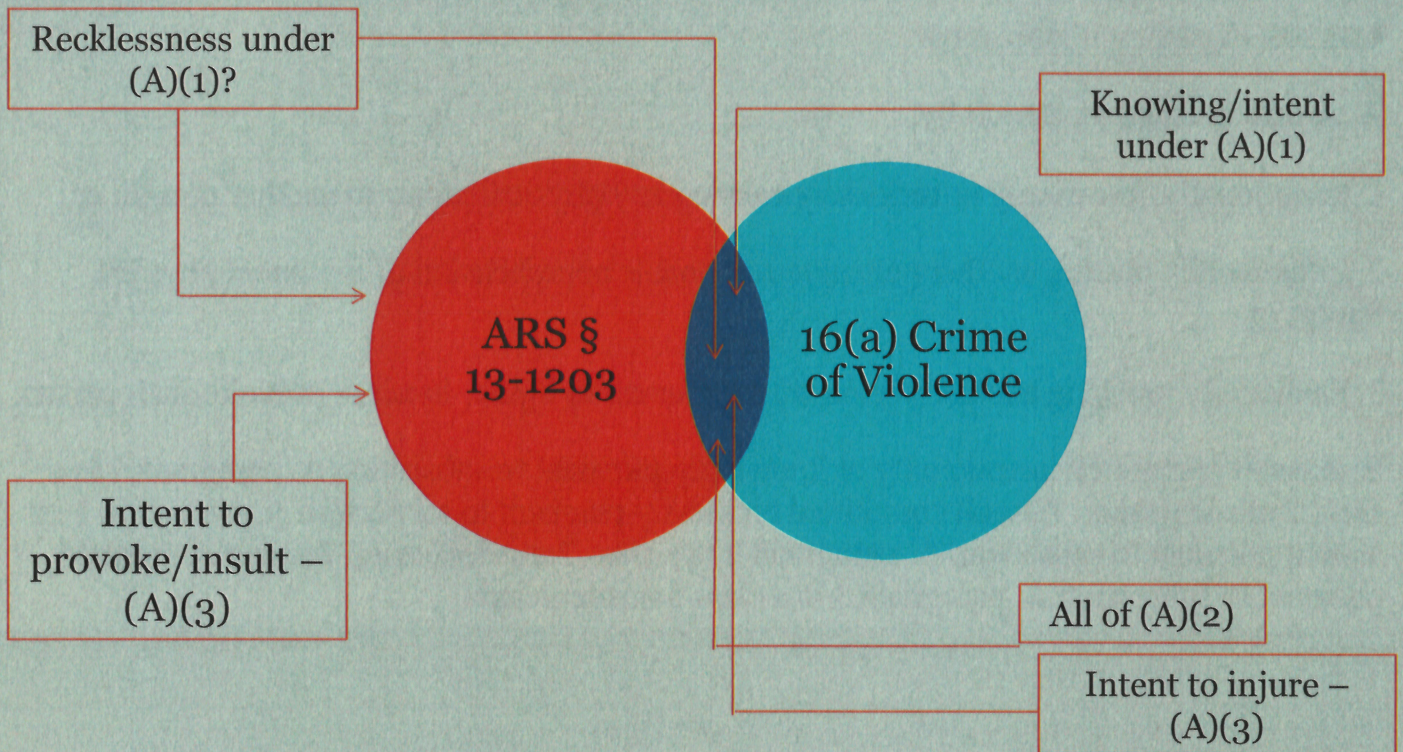
A. A person commits assault by:

3. Knowingly touching another person with the intent to injure, insult or provoke such person.

- Touching, alone, not a form of “violent, physical force”
- Touching with the “intent to injure”
 - 16(a): “attempted use of physical force”
 - Attempt = substantial step towards the use of physical force (touching) + the specific intent to use physical force (intent to injure)
- Touching with the intent to “insult” or “provoke” does not involve the intent to use physical force

Conclusion: Some but not all of the conduct covered by (A)(3) falls within the definition of a COV under 16(a)

Recap



Step 4: Divisibility



As between the various subsections:

13-1203. Assault; classification

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult or provoke such person.

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

Different sentences for each subsection

Step 4: Divisibility



As between the various subsections:

- Disjunctively phrased
- Differentiated by subsections (e.g., (A)(1), (A)(2), etc.,)
- Potential sentences differ
 - (A)(1) punished as class 1/2 misdemeanor
 - (A)(2) punished as a class 2 misdemeanor
 - (A)(3) punished as a class 3 misdemeanor
- Jury unanimity required as to which subsection
 - *State v. Valentini*, 299 P.3d 751, 754 (Ariz. Ct. App. 2013)

Conclusion: Likely divisible

Step 4: Divisibility



As between the different mens rea of (A)(1)

13-1203. Assault; classification

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

Step 4: Divisibility



As between the different mens rea of (A)(1)

- Statute defined alternatively
 - Three alternative M/R provided by statute (listed disjunctively)
- Potential sentences differ with each
 - ARS § 13-1203(B)
 - Intent/Knowing – punished as class 1 misdemeanor
 - Reckless – punished as a class 2 misdemeanor

Conclusion: Likely divisible

Step 4: Divisibility



As between the different mens rea of (A)(3):

13-1203. Assault; classification

A. A person commits assault by:

3. Knowingly touching another person with the intent to injure, insult or provoke such person.

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

Step 4: Divisibility



As between the different specific intent of (A)(3)

- Much tougher call!!
 - ✦ Phrases are listed disjunctively
 - ✦ However, same sentence applies to all potential violations
- Case law re: whether jury agreement is required as to the form of specific intent?
- Possible “peeking” scenario?
- But see dissent in *United States v. Medina-Carrasco*, 815 F.3d 457 (9th Cir. 2016) (decided prior to *Mathis*).

Step 5: MCA



- Apply the MCA to determine which subsection – (A)(1), (A)(2), or (A)(3) – formed basis of conviction.
- If the records establish:
 - (A)(1)→ MCA may be further applied to determine which M/R formed basis of conviction (if necessary)
 - (A)(2)→ COV
 - (A)(3)→ depends if listed M/R are alternative means or elements
 - If alternative means→ indivisible; not a COV
 - If elements→ divisible; MCA may be applied

“Domestic” in Nature



Apply a circumstance-specific approach to determine if the victim falls within one of the protected classes under 237(a)(2)(E)(i)

- *Matter of H- Estrada*, 26 I&N Dec. 749 (BIA 2016)
- *Cf. Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004)



THE END

